

CASES DETERMINED
BY THE
SUPREME COURT
OF
THE STATE OF MISSOURI
AT THE
APRIL TERM, 1885.

(Continued from Volume 85.)

THE STATE *ex rel.* MORRIS *et al.*, Appellants, v. THE
HANNIBAL & ST. JOSEPH RAILROAD COMPANY.

1. **Railroad : HIGHWAYS.** It is the duty of a railroad company, without a statutory requirement to that effect, to so construct its road as not to prevent the public from using its highways, and this duty is a continuing one.
2. **Mandamus.** Mandamus is an appropriate remedy to compel the restoration of a highway, by a railway, to its proper condition, and, in this respect, to require the company to perform its charter duties.
3. ——— : RELATORS : PRIVATE CITIZENS. It is sufficient for the relators in such proceeding to show that they are citizens and thus interested in the performance of a public duty.
4. **Railroad : HIGHWAY, OBSTRUCTION OF.** In a mandamus proceeding to compel a railway company to so construct its road as not to prevent the public from using a specified part of a highway, it is no defence that the track had formerly been placed in the highway by another railway company. Such fact is no justification of the continuance of the obstruction of the highway by defendant to the entire exclusion of the public.

Appeal from Clay Circuit Court.—HON. G. W.
DUNN, Judge.

The State ex rel. Morris v. The H. & St. J. Ry. Co.

REVERSED.

Samuel Hardwicke and Simrall & Sandusky for appellants.

(1) Mandamus is an appropriate remedy to compel the respondent to comply with the law and with the charter of the Kansas City, Galveston & Lake Superior Railroad Company, in relation to public highways, under which the respondent's railroad was constructed. *State v. Northeastern Ry. Co.*, 9 Rich. (S. C.) 247; *The People ex rel., etc., v. Troy & Boston Ry. Co.*, 37 How. Pr. 427; High's Ex. L. Rem., secs. 319, 329, p. 226, and secs. 276-7, p. 199 (1 Ed.); *Indianapolis & Cincinnati Ry. Co. v. The State*, 37 Ind. 489; *The People ex rel., etc., v. C. & A. Ry. Co.*, 67 Ill. 118; *Inhabitants of Cambridge et al. v. Charlestown Pr. Ry. Co.*, 7 Metc. (Mass.) 70. (2) In the absence of express charter provisions to the contrary, every railway company is under obligation by the common law to restore every highway that it touches to its former usefulness, or to substitute a new one. *The People ex rel., etc., v. C. & A. Ry. Co.*, 67 Ill. 118. It was respondent's duty, both by common law and by charter, not to obstruct the highway in controversy. (3) Where the public are interested, any private person may move for a mandamus. High's Ex. L. Rem., secs. 431, 434, p. 304; *Union Pacific Ry. Co. v. Hall et al.*, 1 Otto, 355; *The People ex rel. Case et al. v. Collins et al.*, 19 Wend. 56. (4) The obligations of a railway company to restore a highway to its original condition remains constant until performed, and the alteration in the interim a continuing nuisance; the statute of limitation is not applicable. *Hamden v. New Haven & Conn., etc., Ry. Co.*, 27 Conn. 158; *Welcome v. Leeds*, 51 Me. 313; *State, etc., v. Railroad*, 29 Conn. 538. (5) The same duty devolves upon any successor. *People, etc., v. Railroad*,

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67 Ill. 118. And the old highway continues until a new one is substituted. *Barber v. Essex*, 27 Vt. 62. (6) There was nothing in the case showing acquiescence on the part of the public.

Geo. W. Easley for respondent.

BLACK, J.—The relators, judges of the county court of Clay county, and the road overseers, sued out an alternative writ of mandamus, requiring the respondent to so construct its road, where it passes along a specified portion of a public highway, as not to prevent the public from using the highway, or show cause, etc. Upon a trial of the cause, upon an agreed statement of facts, the peremptory writ was denied. Respondent has failed to file any abstract or brief, and we shall look to appellant's abstract as a full and true statement of the case.

The Kansas City, Galveston & Lake Superior Railroad Company was created under a special act passed in 1857; subsequently, its name was changed to the Kansas City & Cameron Railroad Company; and, still later, that corporation was consolidated with the respondent, The Hannibal & St. Joseph Railroad Company. In 1848, the county court of Clay county established a public highway through a part of that county, and along the foot of the Randolph Bluffs, upon a narrow space of level land. From thenceforward this road was used as a public thoroughfare. Long subsequent thereto the railroad company procured a right of way from the owners of the land, and, in 1867, the railroad constructed its road close to the river, using for that purpose a part of the public road. This rendered the public road more or less unsafe, but it was still continuously and largely used as a public road until 1879. In that year the St. Louis, Kansas City & Northern Railroad Company, claiming a track under certain proceedings to condemn a part of the

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right of way of respondent, removed the road of the Hannibal & St. Joseph Railroad Company, and placed it in the public road, at the same time placing its own road where the Hannibal & St. Joe road-bed was formerly located. The latter company has continued to use its road thus re-located ever since. By reason of all this, the public road was wholly obstructed, and this obstruction has been continued from that time to the filing of this suit. It appears the respondent endeavored to restrain the St. Louis, Kansas City & Northern Railroad Company from thus moving its road, but did not succeed in so doing.

The eleventh section of the charter of the Kansas City, Galveston & Lake Superior Railroad Company provides: "Said company may build said road along or across any state or county road * * * but wherever said railroad shall cross any state or county road, said company shall keep good and sufficient cross-ways, or adequate facilities for crossing the same; and said railroad shall not be so constructed as to prevent the public from using any street, road or highway along or across which it may pass." This statute is clear and explicit. The duty to so construct the railroad as not to prevent the public from using the highway is a continuing one. This duty to so construct the road would be so without the statute. Nothing but express statute will relieve the company from the duty of restoring the public road, which it crosses, to its former usefulness. *People v. C. & A. Ry. Co.*, 67 Ill. 118.

Mandamus is an appropriate and proper remedy to compel the restoration of a highway to its former state, and, in this respect, to require the corporation to perform its charter duties. High on Ex. Legal Rem., sec. 320; 2 Rorer on Railroads, 934. The question here is one of public right, and the better opinion is that it is sufficient for the relators in such cases to show that they are citizens, and thus interested in the performance of a

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public duty. It was not necessary that the proceedings should be presented by a law officer of the state. It was eminently proper for these relators to institute this proceeding, though they do so in their private and not official capacity. *Union Pac. Ry. Co. v. Hall et al.*, 91 U. S. 343; High on Ex. Legal Rem., sec. 431. These principles of law appear to be incorporated in the instructions given by the court, but it would seem the writ was denied on the ground that the remedy had been lost from acquiescence of the public, and on the further ground that the respondent was not responsible for the obstruction. There is nothing to show that the public have acquiesced in this wrongful use of the road. It is true the railroad was placed partly in the public road and so used up to 1879, but the travel thereon was not obstructed. It was open and used as a public road all the while. It is not for this use the complaint is made, but it is made because of the total obstruction in 1879, and the continuance thereof ever since that date. As to this we do not find an element of acquiescence in the agreed facts. The public was, simply, without authority of law, so far as this record shows, ousted of the entire use of the road, with no effort on the part of either company to provide another road way. There was no abandonment of the road. *State v. Culver*, 65 Mo. 607.

We do not see how the act of the St. Louis, Kansas City & Northern Railroad Company, in taking up the road-bed of the respondent and placing it in the public road can justify the latter in letting it remain there, and continuing the use thereof, so as to entirely obstruct the travel. It may be that this act of the St. Louis, Kansas City & Northern Railroad Company was in disregard of respondent's rights, but that cannot justify the continuance and use of the obstruction to the entire exclusion of the public. What the rights were, or are, as between

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these two companies, we are not at liberty to consider here, on this record. The relators are not responsible for the result of the litigation between them.

On the agreed facts there should have been awarded a peremptory writ.

The judgment is reversed and the cause remanded, with instructions to the circuit court to issue a peremptory writ. Ray, J., dissents. The other judges concur.

THE STATE V. JACKSON, *Appellant*.

1. **Criminal Law : LARCENY : POSSESSION.** Defendant pastured cattle for one T. They escaped and when they returned to T's there were two with them that did not belong to the latter. Defendant claimed the two as his and sold them to T. *Held*, in a prosecution against defendant for the larceny of the two, that this tended to prove that they had previously been in his possession.
2. — : **VENUE, PROOF OF.** Venue need not be proved by direct evidence, but may be proved indirectly.
3. — : **LARCENY : VENUE.** One who steals property in one county and takes it into another may be indicted, tried and convicted in the latter county. Where one steals cattle in one county, and they escape from him, and he pursues them into another county, and there takes possession of them as his property, and disposes of them, as such, he is guilty of stealing the property in the latter county. R. S., sec. 1691.

Appeal from Lewis Circuit Court.—HON. BEN. E. TURNER, Judge.

AFFIRMED.

Blair & Marchand for appellant.

(1) There is no evidence that defendant took the

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cattle or ever had them in his possession. To constitute larceny there must be an *actual taking* and an *actual transportation*. 2 Bouvier's Law Dic., Title, "Larceny;" 2 Whar. Crim. Law, sec. 1750; *State v. Witt*, 9 Mo. 663; *State v. Conway*, 18 Mo. 321; *State v. Martin*, 28 Mo. 530; *State v. Gazell*, 30 Mo. 92. (2) Fraud and trespass must combine to make larceny. *State v. Conway*, 18 Mo. 321; *State v. Williams*, 35 Mo. 224; *Hall v. Adkins*, 59 Mo. 144. (3) It is essential to show *actual transportation* to constitute larceny. *Hall v. Adkins*, *supra*; *State v. Gazell*, *supra*. (4) The cattle in question were either defendant's own or Dunlap's at the time he contracted with Tate for pasturing them. If his own, no crime or wrong was done. If Dunlap's, the fact that defendant claimed them as his did not change the ownership or possession thereof, nor did his claim or contract of pasturage make a constructive taking and removal. *State v. Martin*, 28 Mo. 530. (5) The verdict shows prejudice against defendant and should be set aside. *State v. Burgdorf*, 53 Mo. 65; *State v. Musick*, 71 Mo. 401; *State v. Cook*, 58 Mo. 548.

B. G. Boone, Attorney General, for the state.

(1) The indictment is sufficient. *State v. Owen*, 78 Mo. 367. Time is not of the essence of the offence, in this case, and it was not necessary to allege a day certain on which the larceny was committed. R. S., sec. 1821; *State v. Wilcoxon*, 38 Mo. 370. (2) The first instruction is correct and the second properly authorized a conviction for grand larceny under section 1307, Revised Statutes. 1 Whar. on Cr. Law (8 Ed.) sec. 908; 2 Bish. Crim. Law (7 Ed.) sec. 882, note 3; *State v. Martin*, 28 Mo. 530. (3) The third instruction has been approved by this court. *State v. Kelley*, 73 Mo. 608. The possession of Tate was the possession of defendant. *Williams v. Evans*, 39 Mo. 205; *Gates v. Fitzpatrick*, 64 Mo. 185.

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(4) Although there were two counts in the indictment, but one offence was charged, and a general verdict was sufficient. *State v. Miller*, 67 Mo. 604. (5) The word "feloniously" was properly used in the indictment, but was not used or defined in the instructions. It was not necessary. The word is only used to classify offences, but it is not a distinct element of crime. *State v. Snell*, 78 Mo. 240. (6) The asportation was complete. 2 Car rington & Payne's Reports, 423; 1 Whar. Cr. L. (8 Ed.) sec. 924; *Hogsett v. State*, 40 Miss. 522. Defendant had the property in his possession, sold it soon afterwards, and has failed to satisfactorily explain how he came by it. This is sufficient to sustain a verdict of guilty under the indictment. *State v. Hollet*, 19 N. W. Rep. 206.

HENRY, C. J.—Defendant was indicted by the grand jury of Lewis county for stealing a steer and a heifer, the property of one Dunlap. He pleaded not guilty, but, on a trial of the cause, was found guilty and sentenced to two years' imprisonment in the penitentiary, and has prosecuted this appeal. The evidence was substantially) as follows: In June, 1884, defendant agreed with Horace Tate to pasture for him about thirty head of young cattle. Defendant lived on the "Mendenhall farm," about four miles from Tate. He took the cattle and placed them in his pasture, from which in less than a month they escaped and went back to Tate's, and were, with the two which defendant is alleged to have stolen, turned into Tate's pasture. A few days after defendant went to Tate's, and, claiming the two which did not belong to Tate, agreed with the latter to pasture them for him, and, shortly after, sold them to Tate. The evidence clearly establishes Dunlap's ownership of the cattle, and there was abundant evidence that defendant committed the theft of which he was accused.

It is urged that there was no proof that defendant ever had possession of the cattle, but the fact that Tate's

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cattle escaped from defendant's possession, and that these went with them to Tate's, and that, in a day or two afterwards, defendant went to Tate's and claimed them as his own, certainly tends to prove that they had previously been in his possession.

The only plausible objection to the verdict relates to the proof of venue. There is express testimony that both Tate and Dunlap resided in Lewis county. That in 1883 defendant lived in Lewis county, and in 1884 moved to the "Mendenhall farm." The location of that farm with reference to Tate's, Dunlap's and other farms, proved to be in Lewis county, was evidence from which the jury might have found that the crime was committed in Lewis county, but, aside from this, it is provided that if one steals property in one county and carries it into another, he may be indicted, tried and convicted for the larceny in the latter county, in the same manner as if such larceny had been committed there. Sec. 1691, R. S., 1879. If the cattle had escaped from his possession in the county in which they were stolen, and he pursued and found them in another county, and there took possession of them as his property, and disposed of them, as such, he was guilty, under section 1691, of stealing the property in the latter county. The case is fully embraced by that section.

In either view the evidence warranted the conviction, and the judgment is affirmed. All concur.

ROBERTS, *Administrator*, v. NELSON, *Appellant*.

1. **Widow's Right to Mansion House: DOWER: EJECTMENT: RENTS AND PROFITS.** The widow has the right to remain and enjoy

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the mansion house of her deceased husband, and the messuages and plantation thereto belonging, until dower is assigned to her; this right can only be terminated by the assignment of dower, and ejectment will lie to enforce her right of possession to such lands, and she is entitled to the whole of the rents where there is no outstanding lease at the date of her husband's death.

2. **Death of Widow, Pending Suit: REVIVAL IN NAME OF ADMINISTRATOR: EJECTMENT: DAMAGES.** Where the widow dies, pending an action of ejectment by her for the recovery of possession of the mansion house and messuages, the suit may be revived in the name of her administrator and recovery had for rents and profits, by way of damages, to the time of her death.
3. **Ejectment: DAMAGES: STATUTE.** The statute with respect to ejectment suits contemplates that damages may be declared for in the same suit and in the same court.
4. **Sheriff's Deed: JUDGMENT: NOTICE: CITATION.** A sheriff's deed, based upon certain judgments of the county court for principal and interest due upon township school bonds, under Revised Statutes, 1855, where such judgments recite a notice, but not a citation, as provided for by Revised Statutes, 1855, page 1425, section 29, is void.
5. ——— : ——— : **SALE.** Such deed is void where the sale under the judgment is made at the sitting of the county court, instead of during a term of the circuit court.
6. ——— : ——— : ——— : **DOWER.** Where a sheriff's deed is based upon a judgment against the husband and a sale thereunder before his death, it will not deprive the widow of her dower, and until dower is assigned to her she will be entitled to the possession of the property.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER, Judge.

AFFIRMED.

O. H. Travers and F. S. Heffernan for appellant.

(1) If this action is under the dower law the circuit court of Greene county had no jurisdiction of the case. See section 4, page 58, local laws of the state of Missouri, 1855, published in 1865, giving the probate court of Greene county the exclusive original jurisdiction in pro-

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bate of wills and assignment of deeds. (2) This being an action of ejectment the cause could not be revived in name of administrator of Aletha J. Roberts. (3) The judgment, if at all, should be for only one-third of the amount proved and special against the land, and should not include rental value of the improvements. R. S., sec. 2228; *Griffin v. Regan*, 79 Mo. 73; *McClanahan v. Porter*, 10 Mo. 746; *Reilly v. Botes*, 40 Mo. 469; *O'Flaherty v. Suttor*, 49 Mo. 583. This was plainly an action in ejectment. It matters not what circumstances gave the plaintiff the right of recovery, that right was not affected by her death. It survived to her heirs, and when a plaintiff dies, the suit, in an action of this kind, must be revived in the name of the heirs. *Fine et al. v. Gray*, 19 Mo. 33. The executor or administrator cannot maintain the action. *Burdye v. Mackey*, 7 Mo. 374. Section 2253, of the Revised Statutes, does not apply to this case, for the reason that that section does not contemplate a change of the parties to the action, but only the extinguishment of the *right* of action. There was no testimony to show the death of William G. Roberts. The deposition was not admissible. His death could only be established by some person who knew him, and saw his body when dead. 1 Greenleaf (13 Ed.) secs. 103 and 104; Phillips on Evidence (4 Am. Ed.) 233; 2 Greenleaf (13 Ed.) secs. 278 *g*, and 278 *h*; Abbott's Trial Evidence, p. 90, and notes thereto.

W. C. Price and *C. W. Thrasher* for respondent.

(1) The coroner's deed to Farmer and Caynor was absolutely void and conveyed no title to the grantees named therein. The notice required to be given by section 29, page 1425, Revised Statutes, 1855, was never given to defendant; he never appeared to the proceeding, and the judgments are void for want of jurisdiction of the defendant. This was a summary proceeding, under

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a special statute, by a court of limited jurisdiction, and to be valid the record must show substantial compliance with the provisions of the statute. *State v. Metzger*, 26 Mo. 65; *Walker v. Turner*, 9 Wheat. 549; *Galpin v. Page*, 18 Wall. 350; *Mills v. Martin*, 19 Johns. 34; *Shufeldt v. Buckley*, 45 Ill. 223; *Sears v. Terry*, 26 Conn. 273; *Freeman on Judgments* (3 Ed.) sec. 123. (2) The sale recited in said deed was an execution sale by the coroner of the county, made during the session of the county court, and not during the session of the circuit court, and is, therefore, null and void, and may be attacked collaterally or otherwise. R. S., 1855, p. 746, sec. 45; *McClurg v. Dollarhide*, 51 Mo. 347; *Bank v. Evans*, 51 Mo. 335; *Bruce v. Leary*, 55 Mo. 431. (3) Said coroner's deed is void for the further reason that it was not acknowledged before the circuit court, as required by statute. R. S., 1855, p. 748, sec. 57; *Ryan v. Carr*, 46 Mo. 483; *Adams v. Buchanan*, 49 Mo. 64; *Freeman on Executions*, sec. 331. (4) Aletha J. Roberts, as the widow of William G. Roberts, deceased, was entitled to possession of the mansion house and the mesuages or plantation thereto belonging, of her deceased husband until her dower was assigned and could maintain ejectment therefor. R. S., 1855, p. 672, sec. 21; *Stokes v. McAllister*, 2 Mo. 163; *Jones v. Manly*, 58 Mo. 559; *Miller v. Tally*, 48 Mo. 503; *Brown v. Moore*, 74 Mo. 633. (5) The administrator was the proper party to prosecute the suit for damages and costs under the statute. R. S., 1879, sec. 2253; *Tyler on Eject.* 839, 840; *Clark v. Railroad*, 36 Mo. 202; *Brewington v. Stephens*, 31 Mo. 38; *Carlisle v. Rawlings*, 18 Mo. 166. (6) If plaintiff prevailed in the action he was entitled to recover, by way of damages, the rents and profits down to the time of the expiration of plaintiff's title.

BLACK, J.—1. This was an action of ejectment. On the trial the death of W. G. Roberts, the common

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source of title, was admitted. It was also conceded that Aletha was his widow and that no dower had ever been assigned to her. The proof is conclusive that she continued to reside on the home place of the deceased and that the lands in question constituted a part thereof. She had the right to remain in and enjoy the mansion house, messuages and plantation thereto belonging, until dower was assigned to her. R. S., 1855, p. 672, sec. 21. This right can only be terminated by the assignment of dower. Ejectment will lie to enforce her right of possession to such lands and this suit was, therefore, properly brought by her. *Brown v. Moore*, 74 Mo. 633; *Miller v. Talley*, 48 Mo. 503; *Jones v. Manly*, 58 Mo. 559; *Stokes v. McAllister*, 2 Mo. 163. And she is entitled to the whole of the rents where there is no outstanding lease at the date of the death of her husband. *Orrick v. Robbins*, 34 Mo. 226.

2. The further question arises whether the suit could be revived in the name of the administrator of the widow, she having died pending the suit. The administrator was allowed to recover rents by way of damages down to the death of the widow, but not possession of the lands. This, it is contended, was error. Of course, the lands descended to the heirs, or if the defendant had the title he became entitled to the possession. But the administrator was the proper party to recover the rents and profits. They were assets of the estate. Our statute with respect to ejectment suits contemplates that damages may be declared for in the same suit and in the same count. It expressly provides that, if the plaintiff prevail, he shall recover, by way of damages, the rents and profits down the time of assessing the same, or to the time of the expiration of the plaintiff's title, and that, if the plaintiff's right to the possession expires after the commencement of the suit and before trial, recovery may be had for the damages. In some states the damages for the detention of the property must be sued for in a separate action, or in a separate count in the same suit. The cause

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of action for the damages does not abate, and the administrator is the proper party to sue therefor. There is no reason why the estate should be driven out of court and the administrator compelled to institute a new suit for the rents and profits. For the purpose of recovering them it was entirely competent to revive the cause in the name of the administrator. It has before been so held in actions of forcible entry and detainer, both as to the plaintiff and defendant. *Carlisle v. Rawlings*, 18 Mo. 167; *Brewington v. Stephens, Adm'r*, 31 Mo. 38.

3. The defendant relies for title, in part, at least, upon a deed made by the sheriff to Farmer and Caynor, dated October 8, 1862, and a deed from them to him. This sheriff's deed was based upon certain judgments of the county court, which appear to have been rendered for principal and interest due upon township school bonds. The judgments recite a notice, but not a citation, as provided for in section 29, page 1425, Revised Statutes, 1855. The notice appears to be that contemplated in section 24, which is no citation for judgment at all. For this reason, and because the sale appears to have been made at the sitting of the county court, and does not appear to have been made during a term of the circuit court, the deed must be held to be void. *McClurg v. Dollarhide*, 51 Mo. 347. As to the other sheriff's deed to defendant, based upon the judgment against Roberts and recovered in 1871, its validity depends upon the fact whether the sale was made before or after the death of Roberts. If made before his death, still the widow was entitled to her quarantine and dower, and, until dower was assigned to her, she was entitled to the possession of the property. As to the measure of damages it is enough to say, in addition to what we have already stated, that no instructions were given or refused upon this subject, and hence no such question is before us for review.

The judgment of the circuit court is affirmed. All
concur.

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LEACH V. THE HANNIBAL & ST. JOSEPH RAILROAD
COMPANY, *Appellant*.

1. **Personal Service, Contract for.** When one enters into a contract of service for another for a fixed salary, or compensation, he, *prima facie*, agrees to give the latter his entire time, and the rendition of service by the employe, as a notary public in the employer's business, does not make the latter liable for the statutory fees therefor, in the absence of an agreement or understanding to that effect, or a course of conduct between the parties showing such fees were not to be included in the employe's salary.
2. **Question for the Jury.** Whether such fees were included in the employe's salary is a question of fact for the jury to determine from the evidence, under proper instructions.
3. **Evidence.** Receipts given by the employe to the employer, stating that the sums therein mentioned were in full for all demands for work done during regular and irregular hours, in the employer's service, are admissible in evidence in an action for such fees, and are *prima facie* evidence of payment as therein expressed, and such receipts are also competent evidence to show the capacity in which the employe acted, and the relation he sustained to the employer.
4. ———. It was also competent for defendant, on the trial of such cause, to show that the services of plaintiff, as notary, were performed during regular business hours, while he was in defendant's service.

Appeal from Hannibal Court of Common Pleas:—
HON. JOHN T. REDD, Judge.

REVERSED.

G. W. Easley for appellant.

(1) The plaintiff could not recover on an implied promise to pay for the services rendered. The services being rendered by plaintiff, while in the employment, the law implies that the services were rendered under the contract of employment, unless the contrary be

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shown. *Ross v. Hardin*, 79 N. Y. 85; Wood on M. & S., sec. 90; *Stansbury v. United States*, 1 Ct. of Cl., 123; Smith on Master and Servant (3 Eng. Ed.) 130; *Guthrie v. Merrill*, 4 Kan. 187. (2) The receipts offered in evidence were *prima facie* evidence of payment for all services rendered during regular and irregular working hours, during the period of time covered by them, and the court committed error in excluding said receipts. 2 Whart. on Evid., sec. 1365, and note. (3) The seventh instruction, given by the court on its own motion, did not properly put the question of defendant's damages on its counter-claim before the jury. (4) The verdict and judgment being of the record proper, and it appearing that no judgment was rendered in favor of the defendant, on its counter-claim, the judgment must be reversed. Almost the entire costs of this litigation were made upon the counter-claim, yet, for want of a judgment in its favor, the defendant cannot recover its costs.

H. B. Leach pro se.

(1) There was no evidence that the duties of a notary public were embraced within the duties he was employed to perform as a servant of appellant, or that his salary included his fees as a notary public, hence the first and second instructions were properly refused. (2) Defendant had no ground of recovery growing out of the management by plaintiff, of the suit of Johnson against it. Wharton on Neg., secs. 746 and 747; Sharman & Redf. on Neg., sec. 211, note 2, and sec. 212; *Pennington v. Yell*, 6 Eng. (Ark.) 212; *Harter v. Morris*, 18 Ohio St. 492. (3) The receipts offered in evidence were not admissible; they specify for what services they were given; fees as a notary are not named, and hence not included.

RAY, J.—The respondent was, for a number of years

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prior to 1878, in the appellant's employ as agent to settle claims for stock killed or injured on the railroad, and as assistant for Mr. Carr, who was the general attorney of appellant, and for his services in these behalfs, received a regular salary. During the time of said employment, respondent was appointed and qualified as a notary public, and as such took the acknowledgment of numerous deeds, by defendant, through its land commissioner, and also certified to affidavits of appeals, and also to answers in garnishment made by the appellant, when directed to do so by Mr. Carr. Plaintiff was discharged from said employment by defendant in 1878, and thereafter brought this suit to recover of defendant for said services so rendered as said notary, during his said employment. The plaintiff's claims therefor were appropriately declared on and set out in his petition. There is no conflict, as we gather from the record, as to the actual rendition of said services, or that the rates charged were not such as are authorized by law therefor.

Defendant's answer, so far as we need consider the same, set up said employment of respondent by appellant in the capacities aforesaid, and that the rendition of said notarial service sued for was in due course of said employment, and included in his said compensation, which was duly paid and received. Defendant's answer further set up, by way of counterclaim, that during his employment as its agent, and as an assistant attorney-at-law, one R. M. Johnson began an action against the appellant, before a justice of the peace, to recover four hundred dollars for damages for killing a horse by defendant's cars, and alleged it was respondent's duty to settle said claim and suit, if a legal demand, and if not, to use proper care, ability and diligence, in the defence thereof: that respondent attended the trial thereof before the justice of the peace, and was there offered, and refused, a settlement thereof for the sum of one hundred and sixty dollars. Upon a trial

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thereof judgment was rendered for plaintiff therein, and said cause was appealed to the circuit court of Marion county, where, on account of this plaintiff's negligence, judgment was rendered by default against this appellant for the said sum of four hundred dollars, whereby appellant claims to have been damaged in said sum, and asks judgment therefor.

The reply of plaintiff, so far as we deem the same material, denied that, by the terms of his agreement, he agreed to serve defendant as an attorney at law, but claims and avers he agreed to give such assistance as he could in his capacity as stock agent, on the trial of causes for injury to stock, and that he was not in defendant's employ in any other capacity. It admits respondent's refusal to settle the Johnson claim, and his defence thereof as stock agent before the justice, but denies that it was his duty to manage said cause, or attend the same in the circuit court. The trial resulted in a verdict for plaintiff on his said account in the sum of \$653.50, and for defendant for one cent on his counterclaim. Judgment was entered in plaintiff's favor for said sum, and defendant appealed therefrom to this court.

The defendant, upon the trial, offered in evidence the monthly pay rolls of the company for each month of the years 1873, 1874, 1875, 1876, and 1877, precisely like the one herein set out for the month of February, 1877, except that the amount of the monthly salary raised from one hundred and twenty to one hundred and fifty dollars per month, for the purpose of showing payment of all services during the time covered by them, and to show that the plaintiff was acting, during that time, as assistant attorney. The court admitted the pay rolls from April to October, 1877, inclusive, for the purpose only of showing the capacity in which the plaintiff was employed, and refused to admit those from April to October, 1877, for any other purpose, and refused to admit

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those for the balance of the year 1877, or for any of the other years, for any purpose whatever. In the monthly pay roll for February, 1877, plaintiff's name stands opposite the number thirty-five, and he is designated as stock agent and assistant attorney at one hundred and thirty-five dollars for the month, and his name written on the thirty-fifth line of said pay roll, and under the following receipt :

"I acknowledge to have received from the Hannibal & St. Joseph Railroad Company the amount opposite my name in the following list, in full for all demands for work done during regular and irregular working hours, in the service of said Hannibal & St. Joseph Railroad Company, up to, and including, the date of this pay roll."

This evidence was excluded by the court, as was also the following question directed to the plaintiff ; "Q. Was the business of taking affidavits and acknowledgments performed during the regular business hours, during the time you were employed by the defendant ?" This action of the court was, we think, erroneous. Whether these notarial services were distinct from, and independent of, and not embraced in, the plaintiff's contract of service, was, we think, a question of fact to be determined under proper instructions, from a consideration of all competent evidence that might be offered thereon by the parties. The pay rolls, or receipts, thus offered, were *prima facie* evidence of payment as therein expressed, for all services rendered the defendant during regular and irregular hours, and they were competent and receivable for that purpose, as well as to show in what capacity Leach acted, and the relation he bore to the company. *Prima facie*, respondent sold and hired to defendant his entire time for this salary, fixed and agreed upon between them, and the rendition of service by respondent as notary in and about the defendant's business during the said time, did not make

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defendant liable for the statutory fees therefor, without some agreement, or understanding, or line of conduct between the parties, showing they were not to be included. Plaintiff's earnings, during the time of such employment, would belong to the employer. *Stansbury v. United States*, 1 Ct. of Cl. 123; *Wood's M. & S.* 198; 2 Wharton on Ev., sec. 1365, and note.

As bearing further upon this question, the inquiry made of plaintiff as to whether the affidavits and acknowledgments were taken during the regular business hours might, we think, have been properly allowed. As the case must go back for re-trial, we may add that we see no prejudice to the defendant in the court's ruling upon the counter-claim in the then state of evidence. Although the Johnson claim may have constituted a legal liability against defendant, plaintiff's duty to settle the same was not an absolute one—he was not bound to give a sound opinion on that question, and in rejecting the offer plaintiff probably relied upon the statement of defendant's witness, who, upon the trial, may have been contradicted and disbelieved. We can see nothing upon which to base an action of negligence for a failure to settle said claim. As there was no evidence showing defendant's pecuniary damage, or loss by the defendant in the circuit court, the instruction for nominal damages was, we think, correct.

For these reasons, the judgment of the court of common pleas is reversed and the cause remanded for further proceedings in conformity hereto. All concur.

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THE STATE V. YERGER, *Appellant*.

1. **Criminal Law: FORGERY IN SECOND DEGREE: INDICTMENT.** An indictment for forgery in the second degree under Revised Statutes, section 1406, examined and approved.
2. — : — : —. In an indictment for forgery, it is not necessary to expressly allege that the name charged to have been forged was affixed to the forged instrument, when the latter is set forth according to its tenor and shows such to be the fact.
3. — : FORGERY: TENOR: PURPORT. Where the tenor of the forged instrument is exact, and complete, and sufficiently gives the purport, the purporting clause may be rejected as surplusage.
4. **Forgery: INDICTMENT: INTENT.** It is not necessary to the validity of an indictment for forgery that it should charge an intent on the part of the defendant to defraud any particular person.
5. **Practice, Criminal: PRESENCE OF DEFENDANT IN COURT DURING TRIAL.** When the record in the appellate court shows that the defendant in a criminal cause was present at the commencement, or any other stage of the trial, it will be presumed, in the absence of evidence in the record to the contrary, that he was present during the whole trial. R. S., sec. 1891.
6. **Criminal Law: FORGERY: EVIDENCE.** An alleged forged instrument is properly admitted in evidence, where it is correctly described in the indictment, or set forth according to its tenor.
7. — : — : INDICTMENT. It is not necessary in an indictment for forging a check, to set out the indorsement thereon, as that is not charged to be forged and has nothing to do with the forged instrument.
8. — : — : EVIDENCE: VENUE. The possession of a forged instrument, or the uttering of it by one in the county where the indictment is found, is strong evidence to show that the forgery of the instrument was committed by him in the same county.

Appeal from Jackson Criminal Court.—HON. H. P. WHITE, Judge.

AFFIRMED.

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The indictment, omitting the formal part, is as follows: "Feloniously did forge, counterfeit and falsely make a certain false, forged and counterfeit check, purporting to be made by Plankington, Armour & Co., a fictitious firm, and the said check purporting to be drawn on the Bank of Kansas City, a banking corporation duly organized according to the laws of the state of Missouri, which said false, forged and counterfeit check is of the tenor following:

"\$50.00

KANSAS CITY, Mo., Sept. 19, 1883.

"BANK OF KANSAS CITY

"Pay to E. M. YERGER..... or bearer,

"Fifty..... $\frac{00}{100}$ Dollars.

"No. —

PLANKINGTON, ARMOUR & Co.

"With intent then and there and thereby feloniously, to injure and defraud, against the peace and dignity of the state.

"And the grand jurors aforesaid, on their oaths aforesaid, do further say and present that E. M. Yerger, whose christian name is unknown to the jurors, at the county of Jackson, in the state of Missouri, on nineteenth day of September, 1883, a certain false, forged, and counterfeit check, purporting to be made by Plankington, Armour & Company, a fictitious firm, and purporting to be drawn on the Bank of Kansas City, a banking corporation duly organized under and by virtue of the laws of the state of Missouri, which said false, forged and counterfeit check is as follows:

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"\$50.00

KANSAS CITY, Mo., SEPT. 19, 1883.

"BANK OF KANSAS CITY

"Pay to E. M. YERGER, or bearer,

"Fifty ⁰⁰/₁₀₀ Dollars.

"No. — PLANKINGTON, ARMOUR & Co.

"Feloniously did pass, utter, and publish as true to one John L. Lyons, with intent him, the said John L. Lyons, then and there and thereby to injure and defraud, he, the said E. M. Yerger, then and there well knowing the said check to be false, forged, and counterfeited, against the peace and dignity of the state."

Jenkins, Clark & Thomas for appellant.

(1) The indictment does not follow the language of the statute. (2) The record does not show on what charge defendant was arraigned. (3) It does not appear from the record that the defendant was present in court when the jury returned their verdict. *State v. Able*, 65 Mo. 37; *State v. Barnes*, 59 Mo. 154. (4) The court had no authority to pass final sentence on defendant, immediately on overruling his motion for a new trial. R. S., sec. 1970. (5) The court should not have allowed the check offered in evidence to be read to the jury. (6) The indorsement on the check was a material part of it and the indictment should have shown it. *State v. Hardy*, 20 Me. 81; *Haslip v. State*, 2 Neb. 115. "The writing, when produced, must agree in all essential respects with the description of it in the indictment." 3 Greenl. on Evid. (8 Ed.) sec. 108; 2 Russ. on Crime, sec. 344; 2 Arch. Crim. Pl. 803. In indictments for forgery, very slight inaccuracies will be fatal. *State v. Fay*, 65 Mo. 490; *State v. Chamberlain*, 75 Mo. 382; *State v. Smith*, 31 Mo. 120. (7) If the defendant gave a reasonable account of his possession of the check when first notified that it was not good, this account overcame any pre-

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sumptions arising from such possession and threw the burden of disproving this account on the prosecution. *Jones v. State*, 30 Miss. 653; *Belot v. State*, 36 Miss. 96; *Garcia v. State*, 26 Tex. 209; *Stokes v. State*, 58 Miss. 677; *Grade's case*, 12 Wis. 591; *Hall's case*, 8 Ind. 440; *Perry v. State*, 41 Tex. 488. It was the duty of the court to give correct instructions covering the whole law arising on the facts. *State v. Banks*, 73 Mo. 592. (8) If defendant gave a reasonable account of his possession of the check, the jury should have been told this overcame any presumption of guilt arising from its being found in his possession. *Stokes v. State*, 58 Miss. 677; *Littlejon v. State*, 59 Miss. 273; 3 Greenl. on Evid., sec. 31; Stark on Evid., sec. 840; Russ. on Crim., sec. 337; 2 Best on Evid., sec. 323; *Belot v. State*, 36 Miss. 96; *Garcia v. State*, 26 Tex. 209. (9) The court should have granted a new trial. The Supreme Court will look into the whole evidence in a criminal case and reverse if the conviction is not warranted by the evidence. *State v. Cook*, 58 Mo. 540; *State v. Connell*, 49 Mo. 282; *State v. Marshall*, 47 Mo. 378; *State v. Burgdorf*, 53 Mo. 65.

B. G. Boone, Attorney General, for the state.

(1) The indictment is sufficient. It employs the substantial words of the statute, and enables the court to see under what section it is framed. R. S., sec. 1406; Bishop Crim. Procedure, secs. 360, 361; *Simmons v. State*, 12 Mo. 268; *State v. Ragan*, 22 Mo. 459; *People v. Thompson*, 4 Cal. 238; *United States v. Bachelder*, 2 Dallas, 15. (2) The record shows that defendant was properly arraigned. (3) The court was not required, under Revised Statutes, section 1970, to wait four days for defendant to file motion in arrest before passing sentence. (4) The court properly permitted the check, offered in evidence, to be read to the jury. (a) Because the check, offered in evidence, was correctly described in the indictment.

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(b) Because the indorsement constituted no part of the check alleged to have been forged. Wharton Crim. Law (8 Ed.) 733; 2 Arch. Crim. Prac. and Pl. (8 Ed.) 1569; *Buckland v. Com.*, 8 Leigh, 732; *Com. v. Ward*, 2 Mass. Rep. 397. (5) The court properly refused to give instruction numbered three asked by defendant. The instructions given by the court of its own motion properly declared the law. (6) The sixth instruction for the state was properly given. *State v. Hopper*, 71 Mo. 425; *State v. Talbott*, 73 Mo. 347.

SHERWOOD, J.—Under the provision of section 1406, Revised Statutes, 1879, the defendant was indicted for forgery in the second degree, the act charged consisting in forging a check for fifty dollars, in the name of a fictitious firm. A second count in the indictment charged the defendant with uttering the forged check. Being tried, he was convicted on the first count and his punishment assessed at five years imprisonment in the penitentiary.

I. The indictment is well enough and follows approved forms. 3 Chit. Crim. Law, 1048; 3 Greenl. Evid., sec. 104; *State v. Kroeger*, 48 Mo. 520; *State v. Fisher*, 65 Mo. 437. And it uses all the words necessary for a sufficient compliance with the section of the statute upon which it is drawn. It was not necessary that the indictment should expressly allege that the name of the fictitious firm was affixed to the check, since the check is set forth according to its tenor, showing the fact to be that the name of the fictitious firm was affixed to the check. And when the tenor is exact and complete and sufficiently gives the purport, then the purporting clause may be rejected as surplusage. 1 Whart. Crim. Law, sec. 737. The purport, of the instrument necessarily appears where the instrument is set forth according to its tenor. 2 Russ. on Crimes (9 Ed.) 805; 3 Chit. Crim. Law, 1041. And it was not necessary to the validity of the first count in the indictment to charge

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that on the part of the defendant there was an intent to defraud any particular person. R. S., sec. 1686; *State v. Scott*, 48 Mo. 422.

II. The record shows the defendant was duly arraigned for forgery in the second degree, the crime of which he was subsequently convicted.

III. The record is defective in that it does not show that the defendant was present in court when the jury returned their verdict, but this defect is neutralized by section 1891, Revised Statutes, giving the statutory presumption, "that when the record in the appellate court shows that the defendant was present at the commencement, or any other stage of the trial, it shall be presumed, in the absence, etc., that he was present during the whole trial."

IV. The check charged in the indictment to have been forged was properly admitted in evidence, being correctly described and also set forth according to its tenor. It was not necessary to set out the endorsement on the check, as that was not charged to be forged, and had nothing to do with the forged instrument. Whart. Crim. Pl. & Prac., sec. 180; Whar. Crim. Law, sec. 738. The indictment charged, and the evidence showed, that Plankington, Armour & Company was a fictitious firm, and the evidence also showed there was no such "real firm" of that name. For these reasons there was no discrepancy between the facts charged and those proved.

V. The last point for discussion is the claim made by defendant's counsel, that the evidence does not justify the verdict. The chief evidence against the defendant in the cause was the fact established on the trial, that the defendant was the utterer of the forged bill, which bears date at Kansas City, September 19, 1883, and is drawn on a bank at that place, and made payable to defendant or bearer. This evidence was, also, supplemented by statements which he made just preceding his

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arrest, and when he took his stand as a witness ; and, also, some other testimony having a little bearing on the issue. In *Commonwealth v. Talbot*, 2 Allen, 161, the defendant being indicted for forging a receipt, the trial court instructed the jury that the possession of the instrument by the person claiming under it, or seeking to derive benefit from it, was strong evidence tending to show that he made the false signature, or caused it to be made, and this instruction was expressly approved. Upon a like state of facts, where the forged instruments were found in the hands of the accused, similar rulings have been made in other states. *State v. Morgan*, 2 Dev. & Bat. 348 ; *State v. Britt*, 3 Dev. 122 ; *Spencer v. Com.*, 2 Leigh 751 ; *Johnson v. State*, 35 Ala. 370 ; *Bland v. People*, 3 Scam. 346 ; *State v. Jones*, 1 McMullan, 236 ; *Henderson v. State*, 14 Tex. 503 ; *Com. v. Parmenter*, 5 Pick. 279. In the two cases just cited, no doubt was cast upon the rule laid down in the others, the only doubt being expressed was respecting the *mere venue* of the offence, and not that the fact of uttering forged paper was not sufficient for conviction of forgery.

In *United States v. Britton*, 2 Mason, 465, the fact of the alteration of the check drawn in the prisoner's favor, he having endorsed it and presented it for payment, was considered sufficient evidence that the alteration of the check, whereby the amount to be paid was largely increased, was considered sufficient evidence for conviction, although it did not appear when or by whom the alteration was made. Bishop, treating of this point and of the current of the American authorities in respect thereto, remarks : "They seem to indicate that, generally, the possession of forged paper, or, at all events, the uttering of it in the county where the indictment is found, is cogent evidence to be addressed to the jury, that the forgery of the paper was committed by the defendant in the same county." 2 Bish. Crim. Proc., sec. 433. East takes the same view as to the effect of uttering

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forged paper, for he says: "It seldom happens that direct proof can be given of the very act of forgery; and where the forger *is not the utterer*, a difficulty has sometimes occurred as to what shall be deemed sufficient evidence of the fact of forging *within the county laid*."

Touching this point, Wharton, in speaking of the presumption arising from the fact of uttering a forged instrument and of the presumption of innocence, observes: "The defendant is presumed innocent until otherwise proved. In larceny this presumption is overcome by proof that the possession is so *recent* that it becomes difficult to conceive how the defendant could have got the property without being in some way concerned in the stealing. So it is with uttering. The uttering may be so closely connected in time with the forging, the utterer may be proved to have such capacity for forging, or such close connection with the forgers, that it becomes, when so accompanied, probable proof of complicity in the forgery." And he denies that the naked fact of *uttering* will justify a jury in convicting a person of *forgery*. 2 Whar. Crim. Law, sec. 1465 *a*. If this modified way of stating the rule of evidence, in cases of this sort, be taken as correct, it does not help the defendant, for, according to his own statement, he was so closely connected in time with the forging, had such close connection with the forger, as to afford sufficient evidence to justify a verdict. And the possession of the check by the defendant occurred so soon after the forgery was committed, before the ink with which the crime was done had scarcely time to dry, that this, of itself, if the analogy, as Wharton states it, between recent possession in larceny and in forgery is to prevail, renders it difficult to conceive how the defendant could have got the check without being concerned in the forging.

Besides all that, there are intrinsic improbabilities in the story told by defendant when on the witness stand. According to that story, he arrived in Kansas

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City on the cars, from Chicago, on the nineteenth day of September, 1883. On his way he met F. C. Harris, whom he had known in Chicago two or three weeks, bound, also, for Kansas City. To pass the time they played poker on the cars, and defendant won fifty dollars from him, which Harris promised to pay him *in money* when he got to Kansas City. From aught to the contrary appearing, Harris was as much a stranger in Kansas City as was the defendant, and yet, after their arrival at the Union depot in Kansas City, and while defendant waited at the depot, Harris went out and in a *few minutes* returned with and gave the check to defendant, and told him he was going to stop at the Delmonico Hotel. Now if, as appears to be the case, Harris was really a stranger in Kansas City, he would have had to pay the money for the check if he bought it; but *the money* was what Harris promised to defendant, and it was *money* which defendant wanted and not a *check*, as being a stranger in the city, he would find difficulty in getting the check cashed; and yet defendant receives the check without objection. Again, Harris and defendant arrived at Kansas City on the *nineteenth* of September, 1883. The clerk of the Delmonico Hotel testified that, he registered the name of F. C. Harris on the hotel register, residence stated to be from *Missouri*, and that this occurred on the night of September *eighteenth*, the *day before* Harris arrived in the city, if defendant's story is to be credited. Taking all these things into consideration, it would be going too far, farther than any court, so far as I am aware, has yet gone, to say that there is not evidence in this cause sufficient to justify a verdict.

Therefore, the judgment is affirmed. All concur.

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BOOGHER, Appellant, v. BRYANT et al.

Malicious Prosecution : DAMAGES. In an action for malicious prosecution, founded, on a prosecution without probable cause of two of five counts of an information, the plaintiff, in order to recover actual damages, is not required to distinguish by his evidence the damages arising from the prosecution of the two counts sued on from those incident to the other counts. The defendant cannot, by uniting in the information groundless accusations with those for which probable cause might exist, escape liability because of the plaintiff's inability to adjust the damages between the two.

Appeal from St. Louis Court of Appeals.

REVERSED.

W. C. Marshall for appellant.

(1) This action, based on the second and fourth counts of the information, is maintainable, notwithstanding the conviction and subsequent acquittal on the first, third and fifth counts. 2 Greenl. Ev., sec. 449; *Reed v. Taylor*, 4 Taunt. 616; *Ellis v. Abrahams*, 10 Jurist, 593; *Sharpe v. Johnston*, 76 Mo. 660. (2) The plaintiff's legal right of recovery being established, it was not necessary for him to prove special damages; the whole recovery might be exemplary damages. *Callahan v. Caffarata*, 39 Mo. 136; *Buckley v. Knapp*, 48 Mo. 152; *Hill v. Palm*, 38 Mo. 13; *Sharpe v. Johnston*, 59 Mo. 571; *Price v. Whiteley*, 50 Mo. 438; *Curry v. Collins*, 37 Mo. 326; *Nelson v. Musgrove*, 10 Mo. 648; *Sharpe v. Johnston*, 70 Mo. 660; *Boogher v. Knapp*, 76 Mo. 457; 2 Greenleaf on Ev., sec. 456. (3) This being the second verdict for the plaintiff, the question of excessive damages cannot be raised. R. S., p. 631, sec. 3705; *State ex rel. Wright v. Adams*, 76 Mo. 605; *Boyce*

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v. *Smith*, 16 Mo. 317. And in such case, if the triers of the facts did not err in a matter of law, "it is useless to examine the instructions." *Pratt v. Cabanne*, 12 Mo. 194; *State ex rel. Wright v. Adams*, 76 Mo. 605.

E. T. Farish for respondent.

(1) The instruction, given at the instance of the plaintiff, as to the damages he was entitled to recover, was erroneous. By it the jury are left without guidance as to what circumstances would entitle plaintiff to exemplary damages. (2) Under no aspect of the case, under the testimony, could a verdict for more than nominal damages have been properly rendered, as it was not shown what proportion, if any, of any loss of money, expense, loss of business, or mental or bodily suffering, if any, were produced by the prosecution, under the two counts in the petition. The value of counsel fees for the defence of the whole prosecution, and, also, for defence of a case for criminal conspiracy, was proved to be eight hundred dollars; but who can say, or what means had the jury of determining, how much of that sum was properly apportionable to the defence on the two counts withdrawn? In the nature of things, the plaintiff's damages, if he sustained any, were unsusceptible of computation. (3) The damages found by the jury were excessive. *Lowenthal v. Strong*, 90 Ill. 74; *Walker v. Martin*, 25 Ill. 347; *Sears v. Hathaway*, 12 Cal. 278; *Patton v. Searl*, 8 Cal. 217.

RAY, J.—This is an action for malicious prosecution, based upon two counts in an information for criminal libel, upon which the present plaintiff was prosecuted in the St. Louis court of criminal correction. There were five counts in the information, each charging a distinct libel published at different times, as to three of which the plaintiff herein was, upon the first trial, convicted, though, upon a reversal of the judgment, and a new

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trial, the plaintiff herein was finally acquitted. As to the other two counts, being the second and fourth in the information, and those on which the present suit is based, those were, on the first trial in the court of criminal correction, withdrawn by the prosecutor after the evidence for the state had been put in.

The petition in this case contains two counts, the first based on the prosecution under the second count of said information, and the second based on the fourth count of said information. It is further alleged in the petition that, in pursuance of the information, of which said second and fourth counts formed a part, the plaintiff was arrested and prosecuted in the court of criminal correction, and that said court, after hearing all the defendants could say, adjudged the plaintiff not guilty; that said prosecution was without probable cause and was malicious, and that the same was at an end.

The answer denies these allegations and justifies the prosecution on the ground that defendants were directors of the Life Association of America, of which said publications were made. After pleading advice of counsel, the answer sets up that the defendants caused the said information to be lodged in said court; that the same contained the said charges, *and other charges*; that upon a trial thereof, about March 13, 1876, the plaintiff herein was found guilty of the *other charges*, which established the truth of *some* of the charges contained in said information, and afforded probable cause for the course pursued by defendants in causing *all* of said charges to be lodged against plaintiff. The defendants further pleaded the statute of limitations of two years. The reply is a general denial.

Upon these issues there were two jury trials in the circuit court, at the first of which the plaintiff had a verdict and judgment for \$15,000, which, on motion of defendants, was set aside and a new trial granted, at which the plaintiff again had a verdict and judgment,

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this time for \$2,500, on each count of the petition, from which the defendants appealed to the St. Louis court of appeals, where the judgment of the circuit court was reversed, and the cause remanded, from which latter judgment the plaintiff appealed to this court. At the last trial the evidence, as shown by the record, is quite voluminous, and, for the present, we omit any statement of it, as the same, so far as material to the question now before us, will hereinafter otherwise appear in the progress of this opinion. From the view taken of the case by the court of appeals, the instructions given and refused need not be set out, except as hereafter noticed.

A synopsis of the opinion of the court of appeals, is reported in 9 Mo. App. Reports, 592, and is as follows :

"1. An action for malicious prosecution, based on one or more counts in an information for criminal libel, may be maintained where the information was without probable cause, as to those counts, though the plaintiff was convicted under other counts in the petition. (2) In such case, the plaintiff can recover only for damages arising from the prosecution on the counts as to which there was no probable cause. (3) Unless it be shown distinctly what damages arose from the prosecution under these counts, the damages will be nominal." The opinion at length is found in the record, from which we quote such portions thereof as indicate more fully the grounds on which its judgment of reversal is based, to-wit :

"The damages with which we are here concerned are such as arise from the presentation or prosecution of the two counts, as distinguished from those upon which the conviction was had. If damage arose from other sources than the prosecution as charged and relied on in the petition, if it arose from the three counts on which the

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conviction was had and their prosecution, the plaintiff ought not to recover the full amount of damages in the present suit. If the plaintiff merely testifies to the effect that in consequence of the filing of the information he was arrested, and that in his defence generally he paid certain sums—which is the state of the case shown by the record—no basis is afforded by which the damages can be adjusted to the injury for which the plaintiff here seeks recovery. It is true that the defendants had no right to present this information, that is, with the second and fourth counts in it; but the question which the plaintiff has raised, both by the petition and upon the issues presented to the jury by instructions, is, what injury arose from such presentation, and from the prosecution of the second and fourth counts, so far as they were prosecuted. As the trial was had below, the verdict should represent this injury and none other.

* * * *

“Thus the case in the instructions, as well as in the petition, was put on the ground of the prosecution of the second and fourth counts, and it cannot be assumed that the finding of the jury is on the basis of anything else than the presentation of those counts, and the prosecution, so far as it proceeded, which took place under them. But the conviction upon the first, third and fifth counts is a justification, and as the case was tried and the issues to the jury framed, no legal injury arose from their prosecution. If distinct injury arose from the presentation or prosecution of the other counts, or damage which is fairly attributable to those counts, the burden is on the plaintiff to show this. So far as appears the same consequences would have resulted if the second and fourth counts had been omitted, so far as any damage to the plaintiff is concerned. Yet the jury have assessed \$2,500 damages on each count of the petition. Thus, in theory, they have not only distinguished between the damages that have arisen from the prosecutions of the

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second and fourth counts, and the results of the prosecution of the counts on which the plaintiff was convicted, but have proceeded as though there were evidence enabling them to apportion damages as to each count in the present petition. This error relates to the evidence, there being no evidence to sustain the verdict as it stands.

“The plaintiff’s instruction as to the measure of damages assumes that evidence exists showing distinctly what damages arose from the prosecution of the counts on which the petition is founded. Thus the instruction reads: ‘If the jury find for the plaintiff he will be entitled to recover such damages as the jury believe from the evidence he suffered by reason of the prosecution mentioned in the plaintiff’s petition, and, in addition thereto, the jury may add such further amount, by way of exemplary or punitive damages, as they may think, from all the circumstances, defendants should be punished with, not exceeding the sum of \$2500 on each count.’ The jury, under the evidence, could not, except by guess, ascertain what damages the plaintiff ‘suffered by reason of the prosecution mentioned in the plaintiff’s petition,’ since the testimony shows no special or peculiar damage thus arising.

* * * * *

“On the evidence the law gave only nominal damages to the plaintiff. We have examined the other instructions, and the criticism made upon them by the defendants, but think that upon the other instructions, both as to those given and refused, the defendants have no ground of complaint. The law appears, in the instructions given for the plaintiff upon the questions of probable cause and malice, to be declared in conformity with the recent decision of the supreme court. *Sharpe v. Johnston*, 59 Mo. 580; *Vansickle v. Brown*, 68 Mo. 627.”

On motion for re-hearing, the court, speaking of

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said instruction, as to the measure of damages, uses the further language: "In the second place, the error of the instruction extends as well to the matter of exemplary damages as to that of actual damages. The jury are told not to be guided by the evidence as to any particular counts or charges, or matters growing out of their presentation or prosecution, or even to the matter of the petition itself, but, without definition as to what circumstances are referred to, are left at liberty to give such further amount as they may think, from all the circumstances, defendant should be punished with, etc. Certainly, if, upon the petition and the instructions asked by the plaintiff and given to the jury, the damages should be limited to those arising from the presentation and prosecution of the second and fourth counts, this instruction was erroneous throughout."

By this opinion it is held, as we understand it, *first*: That plaintiff is required by his evidence to distinguish the damages, arising from the prosecution of the two counts sued on, from those incident to the other counts, improperly joined in the information; that his evidence appearing of record fails to make that discrimination, and, therefore, no basis is afforded by which the damages can be adjusted to the injury complained of; that the verdict should represent this injury only; that the error relates to the want of evidence to sustain the verdict, and that the law on the evidence adduced gave only nominal damages to the plaintiff. *Second*: That the plaintiff's instruction, as to the measure of damages, assumes that evidence exists, showing distinctly what damages arose from the prosecution of the two counts on which the petition is founded; that "the jury, under the evidence, could not, except by guess, ascertain what damages the plaintiff 'suffered, by reason of the prosecution mentioned in the plaintiff's petition,' since the testimony shows no special or peculiar damage, thus arising;" and, further, that "the error of this instruction

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extends, as well to the matter of exemplary damages, as to that of actual damages," and is, therefore, erroneous throughout, etc.

After careful examination, we have not been able to agree with some of the views here expressed, or the conclusion reached by the learned court in this opinion. The authorities show, as we think, that, in order to maintain an action like this, "it is not necessary that the whole proceeding be utterly groundless, for, if groundless charges are maliciously and without probable cause; coupled with others which are well founded, they are not on that account the less injurious, and, therefore, constitute a valid cause of action." 2 Greenleaf's Evidence (14 Ed.) sec. 449; *Reed v. Taylor*, 4 Taunt. 516; *Pierce v. Thompson*, 6 Pick. 193. "As to the damages" (the authorities equally show) "whether the plaintiff has been prosecuted by indictment, or by civil proceedings, the principle of awarding damages is the same, and he is entitled to indemnity for peril occasioned to him, in regard to his life, or liberty, for the injury to his reputation, his feelings and his person, and for all the expenses to which he necessarily has been subjected. And if no evidence is given of particular damages, yet the jury are not, therefore, obliged to find nominal damages only." 2 Greenleaf's Evidence, sec. 466; *Tripp v. Thomas*, 3 B. & C. 427; Bull. N. P. 13-14; *Thompson v. Mussey*, 3 Greenleaf, 305; *Price v. Whitely*, 50 Mo. 439, 442; *Boogher v. Knapp*, 76 Mo. 457.

Elsewhere in its opinion, the court of appeals, speaking of the impropriety and injustice of defendants uniting good and bad counts in the same information, use this language: "Upon principle, it would seem that the fact that some of the charges are well founded, or that a conviction could be procured upon them even, would not justify the defendants, if they had maliciously, and without good grounds, preferred other charges in

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the same indictment. It is difficult to see, whatever might be the difficulty as to the measure of damages, how the cause of action, arising from the presentation of the ill-grounded charges would be done away with, because well grounded charges were presented. The obligation would surely be on the defendants to discriminate, and to avoid uniting, with the charges for which probable cause existed, those for which there was not foundation." From this, it is, manifest that whatever difficulty, or impossibility even, there may be, in discriminating between the injuries, resulting from the good and bad counts, thus improperly blended, is chargeable to the wrongful act of the defendants themselves, and, upon principle, it would seem that they should not now be permitted to plead their own wrong in their own justification. If, by their wrongful acts, the plaintiff could not readily apportion his expenses, or dissect his trouble, care, anguish and vexation, and apportion them among the five counts in the information, it would seem cruel to hold that no basis could, therefore, be afforded by which to adjust the damages to the injuries sustained.

Indeed, it would seem almost a mockery to hold that, by uniting groundless accusations with those for which probable cause might exist, the defendants could thereby escape liability, because of the injured party's inability to divide his damages between the two with delicate nicety. Such, we think, is not the law. It was upon this ground alone, and the giving of plaintiff's said instruction as to the measure of damages, that the judgment of the circuit court was reversed, and the cause remanded. The foregoing instruction, as to the measure of damages, or one substantially like it, was approved by this court, in the case of *Sharpe v. Johnston et al.*, 59 Mo. 574. That case, like this, was for a malicious prosecution, and we see no just objection to the rule, as to the measure of damages, when applied to

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the facts of this case. See, also, *Callahan v. Caffarata*, 39 Mo. 136. We see no merit, in the other proposition, suggested in the brief of defendants' counsel, and they need not be further noticed.

For these reasons the judgment of the court of appeals is reversed, and the cause remanded to that court, with directions to enter up a judgment affirming that of the circuit court. All concur.

BROWN V. THE COVENANT MUTUAL LIFE INSURANCE
COMPANY, *Appellant*.

1. **Instruction.** An instruction should not be given where there is no evidence to authorize it.
2. **Bankruptcy, Discharge in.** A discharge in bankruptcy is not collaterally assailable.

Appeal from Lewis Circuit Court.—HON. BENJAMIN E.
TURNER, Judge.

REVERSED.

M. F. Taylor for appellant.

(1) In making an objection to the introduction of evidence, specific ground of objection must be assigned. *Primm v. Raboteau*, 56 Mo. 412. (2) Parol evidence is admissible for the purpose of explaining ambiguities in the wording of a written instrument. *State v. Linthicum*, 68 Mo. 66; *Franklin Av. Ger. Sav. Ass'n v. Town of Roscow*, 75 Mo. 412; *Carpenter v. Jamison*, *Id.* 295; *People v. Brennan*, 30 Mich. 463. (3) It is error to refuse an instruction when there is material, competent evidence in support of it, and it is equally erroneous to

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give an instruction, when there is no evidence to support it. (4) It was error to refuse appellant's instruction asked on the counter claim, because, to constitute a good plea in bar, a discharge in bankruptcy must have been obtained without fraud, and the creditor was entitled to some notice, so as to give him his day in court. *Batchelor v. Low*, 43 Vt. 662; *Barnes v. Moor*, 2 B. C. 474; *Burnside v. Brigham*, 8 Met. 75; *In re Needham*, 1 Low, 309; *Payne & Bro. v. Able*, 7 Bush 347; *Thornton v. Hogan*, 63 Mo. 144. Every bankrupt or insolvent system in the world must partake of the character of a judicial proceeding. Parties whose rights are to be affected are entitled to a hearing. *Ogden v. Saunders*, 12 Wheat. 366; *Day v. Bardwell et al.*, 97 Mass. 250. To be a good bar the discharge must have been obtained in a proceeding where there was publication of notice. *Koats et al. v. Hayes*, 71 N. C. 109. It does not follow because the act provides a mode by which the discharge may be set aside that its invalidity can be shown in no other way. *Beardsley v. Hall*, 36 Conn. 277. It is not intended by any provision of the act that this court in bankruptcy shall pass in a plenary way upon the question as to whether a particular debt is discharged. That question must be determined by the court in which the debt is sued on, and the discharge pleaded. *In re Kimball*, 2 Bank. Reg. 207. See, also, *In re Rosenberg*, *Id.* 238; *In re Wright*, *Id.* 142.

Anderson & Schofield for respondent.

(1) The Supreme Court will not inquire into the correctness of the action of the trial court in ruling on the evidence, unless the questions thereon be raised in the motion for a new trial. *Hulett v. Nugent*, 71 Mo. 131; *Carver v. Thornhill*, 53 Mo. 283; *Cowen v. Railroad*, 48 Mo. 556. (2) Appellant's instruction number two was inconsistent with itself, and was, therefore,

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rightly refused. *Seymour v. Seymour*, 67 Mo. 303. (3) A defect of parties must be taken advantage of by demurrer, or answer, or the objection is waived. It cannot be reached by instruction. 1 R. S., sec. 3519; *Horstkotte v. Menier et al.*, 50 Mo. 158; *Kellogg v. Malin*, 62 Mo. 429; *Rickey et al. v. Tenbroeck*, 63 Mo. 563. (4) The court committed no error in refusing to permit appellant to prove it had no notice of the bankruptcy. Nor was it error to give respondent's and refuse appellant's instruction on his counter claim. A discharge in bankruptcy is final and conclusive, and is not reviewable in a state court. Bump on Bankruptcy (10 Ed.) 286 and 287, and cases cited in note; *Reed v. Vaughn*, 15 Mo. 137; *Thornton v. Hogan*, 63 Mo. 143. Respondent being a resident of the eastern district of Missouri, the court had jurisdiction over him, and having jurisdiction, it proceeded to adjudge him a bankrupt and to grant him a discharge. R. S., U. S., sec. 5014. And such certificate of discharge is conclusive evidence of the fact and regularity of the discharge. R. S., U. S., sec. 5119. Appellant cannot be heard in a state court to allege anything against its validity, at least as to an ordinary indebtedness; and certainly it cannot be heard to say it was without notice of the proceeding, or that their debt was not scheduled. *Thornton v. Hogan*, 63 Mo. 143; *Shelton v. Pease*, 10 Mo. 474; *Reed v. Vaughn*, 15 Mo. 137; *Bank v. Olcott*, 46 N. Y. 12; Bump on Bankruptcy (10 Ed.) 286 and 287. The validity of a discharge under the United States bankrupt act, cannot be contested in a state court for a fraudulent omission. *Black v. Blazo*, 117 Mass. 17.

BLACK, J.—The defendant leased to the plaintiff a farm for two years, from March 10, 1880, upon certain terms. Defendant reserved the right to sell the place, and plaintiff agreed to yield up possession on payment of a fair compensation for possession. The defendant notified plaintiff that the land was about to be sold, and on

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the twenty-fifth of May, 1881, by letter, notified him that the land had been sold, and also stated: "We have written to Mr. Abbott to see you, and settle with you." Defendant also wrote Abbott, giving him authority to settle with Brown. Plaintiff and Abbott met, and made a settlement, by which the plaintiff was allowed seven hundred dollars for immediate possession, to recover which this suit was instituted. The letters from defendant to Brown and to Abbott, gave the latter ample power to settle, and that, too, without submitting the same to defendant for ratification. The evidence tended strongly to show that an unconditional settlement was made. Abbott's testimony was, however, to the effect that they had some trouble in adjusting the matters, and that the amount agreed upon was to be submitted to defendant for ratification, before the settlement should become final. That the settlement was made upon the condition that the company approved it.

1. The court, of its own motion, gave an instruction to the effect that if it was understood that the settlement should be approved by defendant before the amount should be paid, then the finding should be for defendant, unless the jury should find that the settlement was thereafter ratified by the defendant. The vice of this instruction is that there was no evidence whatever of a ratification. On the contrary, the evidence is that the defendant repudiated the settlement, and continued to do so. The instruction given at the request of plaintiff, and the one given by the court, omitting the qualification as to the ratification, would present the whole case fairly to the jury. It was error to give the instruction with the qualification.

2. The discharge in bankruptcy, pleaded by plaintiff to the defendant's set-off, was a complete defence. The evidence offered by defendant, to the effect that it had no notice of the proceeding in bankruptcy, was properly excluded. The discharge read in evidence was

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conclusive. The regularity of the proceedings by which the discharge was procured cannot be inquired into collaterally. Bump on Bankruptcy (10 Ed.) 286; *Thornton v. Hogan*, 63 Mo. 143.

There is no merit, whatever, in the other questions presented by the appellant. But, for the error before mentioned, the judgment is reversed, and the cause remanded for new trial. All concur.

THE STATE *ex rel.* AMES V. BARCLAY, *Judge, et al.*

1. **Execution Debtor: EXAMINATION OF TO DISCOVER PROPERTY; STATUTE.** In an examination of an execution debtor, under Revised Statutes, section 2410, *et seq.*, to discover his assets, he can be required to disclose, not only that he has property, but where and in whose possession it is, and the terms upon which it is held.
2. ——— : ———. The debtor cannot discontinue such examination by disclosing only so much property as he deems sufficient to satisfy the judgment.
3. ——— : ——— : **IMPRISONMENT FOR DEBT.** The provisions of the statute authorizing such examination of an execution debtor are not repugnant to the clause of the constitution inhibiting imprisonment for debt.
4. ——— : **REFEREE: CONTEMPT.** The referee appointed to conduct the examination has authority to commit the execution debtor for contempt where he refuses to answer proper questions.
5. ——— : ——— : ———. The fact that the debtor was a grand juror at the time of the examination does not exempt him from the operation of the statute, he having appeared and submitted to such examination, and without having made any such suggestion, until after he refused to answer the questions on other grounds.

Prohibition.

WRIT DENIED.

The State ex rel. Ames v. Barclay.

H. J. Grover and I. T. Wise for petitioner.

(1) The questions which Henry Ames refused to answer before the referee were irrelevant and immaterial to the purpose for which the law permitted the examination to be ordered, and Henry Ames had a legal right to refuse to answer them. (2) The statute in question in this case must be subjected to a strict construction. Its means and end cannot be expanded or added to by favorable implication or presumption. *Dwarris on Statutes*, 259; *Webber v. Hobbie*, 13 N. Y. Pr. Rep. 333; *Fowler v. St. Joseph*, 37 Mo. 228; *Ex parte Donaldson*, 44 Mo. 149. (3) The construction put upon the statute by the creditor is within the inhibition of the constitution abolishing imprisonment for debt. *Coughlin v. Ehlert*, 39 Mo. 283.

Dyer, Lee & Ellis for respondent White.

The purpose of the statute is to enable the judgment creditor to compel the judgment debtor to disclose the whereabouts of his property so that it may be reached by an execution to satisfy the judgment that has been recovered in the case. All inquiries tending to promote this object and to assist in this discovery are permissible. *Freeman on Executions*, sec. 404-5.

BLACK, J.—Judgment was recovered against Henry Ames for some six hundred dollars, execution was issued thereon and returned *nulla bona*. The judgment creditor, in due form, applied to the St. Louis circuit court for an order for the examination of Ames, touching his means and ability to pay the judgment, under sections 2410 to 2414, Revised Statutes. Mr. White was appointed referee, under section 2411, to conduct the examination and report the evidence. Ames disclosed real property situate in Franklin and Washington counties.

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He, also, stated that he owned personal property to a large amount, consisting of cash, bonds, etc., but he declined to state where his personal property was situate, or in whose possession it was. The referee reported to the court and was by the court directed to proceed with the examination and require the relator to answer the questions relative to the location of the personal property. Ames again declined to answer the questions. The referee was about to commit him for contempt, when this writ was applied for, directed to the judge and referee.

1. One ground assigned why the questions should not be answered is that they are irrelevant to a proper examination. The order, which the law authorizes the court to make and which was made, is that the party "undergo an examination touching his ability and means to pay and discharge said judgment." It becomes the duty of the court, on the evidence reported, to determine whether the debtor has and owns property, real, personal or mixed, which ought to be applied to the payment, in whole, or in part, of said judgment, and as to this the court is required to give an opinion in writing. The evident purpose of this whole examination is to determine whether the debtor has property which may be taken in execution. In determining this question the court has a right to be informed, not only that there is property, but where it is and in whose possession it is, and the terms upon which it is held. *Lothrop v. Clapp*, 40 N. Y. 330.

2. Nor does the fact that the relator disclosed real estate in different counties from that where the judgment was entered put an end to all further inquiry. The creditor, it is true, may have executions to different counties, but he is not bound to take them out. If the lands were in the same county it would be the duty of the officer having the execution to determine, in the first instance, whether the property which the creditor elects

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to have sold was sufficient. The execution, having been returned unsatisfied, the court had the right to make a full and complete inquiry with respect to the debtor's means to discharge the judgment. It was not bound to stop when the creditor thought he had disclosed sufficient property. The creditor had the power to stop the investigation by paying the debt. He admits having ample means so to do, but declined to answer as to its location. This he may not do.

3. The further objection, that to commit the relator for refusal to answer the questions is to imprison him for non-payment of a debt, is without merit. Imprisonment for debt is prohibited by the constitution of this state. The statute in question does not go so far as to authorize the court to make an order on the debtor to turn over property to the officer, as is the law in many states. There is however no effort here to take the relator's body in execution for non-payment of debt. The court may examine him as to his means and property, and his refusal to answer proper questions is a clear contempt of court. It is for this, and this alone, he is about to be committed. That there is no imprisonment for debt here, is the clear logic of *Roberts v. Stoner*, 18 Mo. 481; *Coughlin v. Ehler*, 39 Mo. 285; *Crenshaw's case*, 80 Mo. 447. Nor do we entertain any doubt as to the power of the referee to commit. The parties are examined as witnesses and their testimony is reported to the court as evidence. Secs. 2411, 2412, R. S. We see no reason why the party to be examined is not liable to be committed for contempt as any other witness. Sec. 4027. Nor why the referee here appointed is not a referee appointed in pursuance of "any order of reference" (sec. 3608), upon whom ample power to commit for contempt is conferred.

4. So far as the point raised, that the relator was a grand juror at the time of the examination, is concerned, it is enough to say that he appeared and submitted to

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the examination without making any such suggestion until he refused to answer the questions on other grounds. He went into the examination and must submit to a full and fair investigation. Practically, the only question here is, whether the statute with respect to these supplemental proceedings is to be regarded as a dead letter or entitled to be respected. We are of the opinion the statute violates no provision of the constitution and it ought to be enforced. The writ of prohibition is denied. Sherwood and Ray, JJ., dissent. The other judges concur.

HOLLAND, Appellant, v. KREIDER.

Homestead. The owner of a homestead, which is not liable to execution for a debt against him, can convey it to a purchaser, who will take it exempt from the same liability.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER, Judge.

AFFIRMED.

F. H. Sheppard for appellant.

(1) An estate by the curtesy, or a marital estate for joint lives, will support a homestead. Thompson on Homesteads (1 Ed.) 174. (2) When a homestead is abandoned judgment liens attach. Thompson on Homesteads (1 Ed.) sec. 263, *et seq.* Sale is abandonment. *Ibid.* (3) A man may not have two homesteads at once. Thompson on Homesteads (1 Ed.) sec. 579; *Eberhart's Appeal*, 39 Pa. St. 509. (4) A judgment is a dormant

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lien which becomes effective whenever the owner of a homestead alienates within three years after rendition. *Eaton v. Ryan*, 5 Neb. 47; *Allen v. Cook*, 26 Barb. 374; *Norris v. Kidd*, 28 Ark. 492, 7; *Eberhart's Appeal*, 39 Pa. St. 509; *Whitworth v. Lyons*, 39 Miss. 467; *Hoyt v. Howe*, 3 Wis. 752; *Tillotson v. Millard*, 7 Minn. 513; Smyth on Homestead and Exemption (1 Ed.) secs. 144, 186. (5) The decision below cannot be supported on the ground that the land was exempt as Kreider's homestead. The evidence shows that he bought on the twenty-seventh and filed his deed on the twenty-ninth. R. S. 1879, sec. 2695.

T. W. Kersey for respondent.

"The law in securing a homestead does not render its humane provision ineffectual by prohibiting an alienation of the premises. The householder may sell his homestead, and with the proceeds acquire another. This would be impossible if the alienation of the first would subject it to judgment debts of the vendor. A judgment creates no lien upon a homestead, and, therefore, none will follow it into the hands of the vendee." *Beckmann v. Meyer*, 75 Mo. 333; *Greene v. Marks*, 25 Ill. 221; *Cole v. Green*, 21 Ill. 104; *Smith v. Allen*, 39 Miss. 469; *Smith v. Rumsey*, 33 Mich. 191; *Black v. Epperson*, 40 Tex. 162; *Wagner's St.*, p. 698, sec. 8. "When a new homestead is acquired the former one loses its exemption from liability for debt, but this manifestly applies only to cases wherein the first is retained as the property of the debtor. The concluding part of the section recognizes a power to sell one homestead and purchase another with the proceeds." *Beckmann v. Meyer*, 75 Mo. 333.

NORTON, J.—This is an ejectment suit to recover the possession of certain lands in Greene county, described

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in the petition. On the trial, defendant recovered judgment, from which the plaintiff has appealed. The evidence in the case shows that J. C. Franklin was the common source of title, and occupied the land as a homestead, from 1863, till he sold it to defendant, in September, 1879; that on the twelfth of May, 1879, judgment was rendered in the Greene county circuit court in favor of *C. B. Holland et al. v. J. C. Franklin et al.*; that on the twenty-seventh of September, 1879, J. C. Franklin and wife conveyed the said land, occupied as a homestead, to defendant Kreider, by deed of general warranty, which was duly recorded September 25, 1879; that after this sale, execution, which issued on said judgment against said Franklin, was levied on said land, and it was sold, plaintiff becoming the purchaser, and receiving a sheriff's deed therefor, dated January 23, 1880, which was filed for record February 28, 1879.

On this state of facts the court gave the following instruction:

"That a homestead, to the extent of one hundred and sixty acres, and not to exceed the value of \$1,500, is exempt from execution where the debt sued on is created subsequent to the acquiring of the homestead; and if J. C. Franklin owned and occupied the land sued for in this action, as his homestead, at the time the debt upon which plaintiff obtained judgment was made, and continued to own and occupy said land, as his homestead, until he sold the same to defendant Kreider, then the title passed to said defendant, and was not subject to plaintiff's execution, and plaintiff cannot recover in this action."

The court refused to give declarations of law asked by plaintiff, asserting his right to recover on the sheriff's deed, under the facts in evidence.

The instruction given by the court was fully warranted by the ruling of this court in the case of *Beckmann v. Meyer*, 75 Mo. 333. In that case, the father, being

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the owner of a homestead, conveyed it to his son for the consideration of \$1,800. After this conveyance was made, the land was levied upon by an execution which issued on a judgment against the father ante-dating the sale to the son, and under this execution the land was sold. On this state of facts it was ruled that the son would hold the land against the execution purchaser at such sale. One of the grounds upon which the decision is based, is that the judgment did not create a lien on the homestead, and it having been bought and paid for in good faith by defendant when it was free from judgment lien, the title acquired by the purchaser was unaffected by the execution sale, and this view of the case is sustained by the Michigan and Illinois cases referred to in the opinion, to which may be added the case of *Danforth v. Beattie et al.*, 43 Vt. 138, where a mortgage of the homestead was held to be valid as against creditors, on the ground that the homestead was not attachable.

The decision was, also, put upon the ground that our statute recognizes the right to sell one homestead and purchase another with the proceeds. This view of the case is fully sustained by the Texas case, cited in the opinion.

Judgment affirmed. All concur.

CURRENT V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Master and Servant: MACHINERY: PRACTICE.** In an action for an injury to a servant resulting from the negligence of the master in furnishing him with defectively constructed machinery to use in his work, the servant cannot recover on the ground that the master failed to keep his machinery in repair.

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2. ——— : PLEADING. A petition founded on the negligence of the master in failing to keep the machinery used by his servants in repair must allege that the master knew its condition, or, by the exercise of due care, might have known it.
3. ——— : MACHINERY : HIDDEN DEFECTS. An employer is not liable for an injury to the servant occasioned by a hidden defect in machinery furnished for his use, unless the employer knew, or, by the exercise of reasonable care, could have discovered such defect.

Appeal from Pettis Circuit Court.—HON. JOHN P. STROTHER, Judge.

REVERSED.

Wm. S. Shirk and T. J. Portis for appellant.

(1) The petition is fatally defective. It does not allege, that this alleged defect in the construction of the brake-hold or hand-wheel, was known to the defendant, or could have been known by it, by the exercise of ordinary care and diligence, or by the exercise of any care or diligence. That it is necessary to allege this, and that the burden of proving it is on the plaintiff, is so well established that a citation of the authorities is scarcely necessary. *Pierce on Railways*, 370, 1, 2 and 373; *Id.* 382; *Wood on Master and Servant*, sec. 348; *McDermot v. Mo. P. Ry. Co.*, 30 Mo. 115; *Gibson v. P. Ry. Co.*, 46 Mo. 163, pp. 173-174; *Lewis v. St. L., I. M. & S. Ry. Co.*, 59 Mo. 495, on p. 504; *Cummings v. Collins*, 61 Mo. 520; *Elliott v. St. L., I. M. & S. Ry. Co.*, 67 Mo. 272, and cases cited in the opinion of the court. The petition shows on its face that the "construction and arrangement" of the brake was apparently proper. Hence the greater the necessity for an allegation that the defendant knew, or, by the exercise of reasonable care, might have known of the defect. It is nowhere alleged that defendant failed to exercise due care in selecting, purchasing or constructing its cars or their brakes. (2) The demurrer to the evidence should have

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been sustained. If the evidence shows any fact clearly, it is this: that the injury resulted from the brake being out of repair—the nut which usually held the wheel or hand-hold onto the brake shaft, having been lost or broken off. There is not an iota of evidence proving or tending to prove that the brake was imperfectly, defectively or dangerously constructed. This was an entire failure of proof of the cause of action stated in the petition. *Beck v. Cummings*, 19 Mo. 30; *Carson v. Cumming*, 69 Mo. 325; *Waldhier v. Han. & St. J. Ry. Co.*, 71 Mo. 514; *Price v. Ry. Co.*, 72 Mo. 414; *Edens v. Ry. Co.*, 72 Mo. 212; *Bullene v. Smith*, 73 Mo. 151; *Ely v. Railroad*, 77 Mo. 34; *Benson v. Railroad*, 78 Mo. 504.

E. J. Smith, L. L. Bridges and Sangree & Lamm
for respondent.

(1) It was sufficient that the petition charged the condition of the brake at the time it caused the injury, and that this was by the negligence of defendant. The petition is clearly good after verdict; both because it is presumed that plaintiff proved and the jury found that which defendant complains was necessary to make it a good petition, and because if the court will take any notice of the bill of exceptions, it appears plaintiff did prove and the jury found the same. Sec. 3882, R. S.; *Sholar v. Van Wormer*, 33 Mo. 386; *Bowie v. Kansas City*, 51 Mo. 454; *State ex rel. v. County Court, Sullivan County*, 51 Mo. 522. Besides, the right way to take advantage of a variance is by affidavit showing surprise, etc.; we, also, say to be of any avail the variance must be substantive—must be such as to amount to a failure of proof of the cause of action stated in the petition. There is no such here. *Metz v. Eddy*, 21 Mo. 13; *Ely v. Potter*, 58 Mo. 158; *Erfort v. Consolus*, 47 Mo. 208; *Carroll v. Pouts*, 16 Mo. 226; *Reeves v. Larkin*, 19 Mo. 192. (3) The plaintiff did all that was required of him; he left

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the car in the hands of the inspector, and, after lapse of time enough for the car to be repaired, he had a right to rely on defendant doing its duty and the fact that the car was repaired. *Combs v. Cordage Co.*, 102 Mass. 572 ; 19 Cent. Law. Jour. 256.

HENRY, C. J.—The plaintiff, who was employed by the defendant as a brakeman, sued for injuries sustained by him, alleged to have been occasioned by defendant's negligence in this: "That it is necessary for the purpose of running and managing said freight trains to have brakes so constructed that they reach to the top or roof of freight cars with a hand-hold or wheel at the top of said car whereby the brakeman may turn said brakes off and on; that the brake wheel or hand hold on one of the brakes on the cars of said train was imperfectly, defectively and dangerously constructed, in this, that it was not fastened to the brake-staff securely and safely, so that it would remain firm and serve its purpose in manipulating said brake, that plaintiff, wholly ignorant of said dangerous defect, and having no means of ascertaining the same, relying on the *apparent proper construction and arrangement of said brake-wheel or hand-hold*, and, while in the line of his duty as such brakeman, at about midnight, undertook to use said brake when the train was running at a high rate of speed, and while in said act, and having hold of said wheel, and twisting said brake, the wheel came off of the brake-shaft, and plaintiff was thrown to the ground and injured."

On a trial of the cause plaintiff obtained a judgment, from which defendant has appealed. On the trial defendant objected to the admission of any evidence, on the ground that the petition did not state facts which constitute a cause of action. It certainly was not framed to present a case of injury occasioned by a failure on the part of the defendant to mend machinery plaintiff had to

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work with, which needed repair. If such were the case it would be fatally defective in not alleging that the defendant knew its condition, or, by the exercise of due care, might have known it. *Smith v. St. L., K. C. & N. Ry. Co.*, 69 Mo. 32; *Porter v. H. St. Jo. Ry. Co.*, 71 Mo. 63; *Hayden v. Smithfield Mfg. Co.*, 29 Conn. 548. The same authorities fully support the proposition that the defendant is not liable for an injury to an employe occasioned by a hidden defect in machinery or implements furnished the employe to work with, unless the defendant knew, or, by the exercise of reasonable care, could have discovered it. To the above may be added the following cases in support of this proposition: *McDermott v. Pac. Ry Co.*, 30 Mo. 115; *Gibson v. Pac. Railroad*, 46 Mo 163; *Dale v. Railroad*, 63 Mo. 455; *Devitt v. Pac. Railroad*, 50 Mo. 302; *Cummings v. Collins*, 61 Mo. 520; *Williams v. Clough*, 3 Hurl. & Nor. 259; *Mad River & L. E. Ry. Co. v. Barber*, 5 Ohio St. 541; *McGatrick v. Watson*, 4 Ohio St. 566; *Wright v. N. Y. Cent. Ry. Co.*, 25 N. Y. 665; *Noyes v. Smith*, 28 Vermont, 59; *Ryan v. Fowler*, 24 N. Y. 410.

The charge in this petition is not that the hand-hold was out of repair, but that it was "imperfectly, defectively and dangerously constructed, in this, that it was not fastened to the brake-staff securely and safely," etc. The plain meaning of this charge is that the hand-hold was so constructed originally that the defect was in the design itself. Such being the cause of action alleged, in order to make a good petition, it was necessary to state that the company negligently or carelessly adopted that hand-brake or continued to use it after ascertaining its unfitness. We are inclined to the opinion that the petition does not state any cause of action. But, however that may be, it certainly was error to admit evidence that the hand-brake was out of repair and that the company neglected to repair it. No such cause of action was stated in the petition and there was an entire failure of proof

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of the cause of action alleged. There was no evidence adduced by plaintiff tending to prove that the brake-wheel or hand-hold was imperfectly, defectively or dangerously constructed, but only that from use its fastening to the brake-staff had been weakened. A party must recover, if at all, on the cause of action alleged. *Waldhier v. Railroad*, 71 Mo. 514; *Price v. Railroad*, 72 Mo. 414; *Bullene v. Smith*, 73 Mo. 151; *Ely v. Railroad*, 77 Mo. 34; *Benson v. Railroad*, 78 Mo. 504.

The court, by its instructions, submitted to the jury the question of the defective construction of the brake, and, also, the question of its want of repair, and the negligence of the company in not repairing it. On the latter proposition the evidence was inadmissible, and on the former there was no evidence at all.

For the foregoing reasons the judgment is reversed and the cause remanded. All concur.

THE CITY OF KANSAS V. CORRIGAN, *Appellant*.

1. **City of Kansas: STREET RAILWAYS: ORDINANCE.** Section one of the ordinance of June 29, 1880, of the City of Kansas, relating to street railways, does not require such railways, or any officer thereof, to pave the street on which their cars are operated.
2. **Misdemeanor: OFFENCE, WHAT NECESSARY TO CONSTITUTE.** There can be no offence or misdemeanor, except as the result of the violation of some duty plainly imposed by a competent law-making power.
3. **Ordinance: STREET RAILWAY COMPANY: CONTRACT.** Where an ordinance of a city, which grants to a horse railway company the privilege of using its streets, requires such railway to keep portions of the street, on which it operates, in good repair, the city cannot, by a subsequent ordinance, compel the company to pave such portions of its street with specified materials, or punish any

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one concerned for operating the cars of the company, where the paving was not done. Such later ordinance would be an interference with the contract between the city and the railway as contained in the ordinance granting the latter its franchise.

Appeal from Jackson Criminal Court.—HON. H. P. WHITE, Judge.

REVERSED.

For briefs of counsel in this case see 85 Mo., p. 263.

SHERWOOD, J. — This proceeding was instituted against the defendant before the city recorder, by information based on an ordinance of the City of Kansas, bearing date June 29, 1880, as follows:

"Section 1. No person, company, or corporation, nor any person as president, superintendent, or other officer, or agent of any street or horse railroad company or corporation, shall keep, use, or maintain any street or horse railroad track, or part of a track upon any street, or part of a street, in the City of Kansas, which said street or part of a street, is now, or hereafter may be paved with blocks of stone, wood, granite, or other material, unless the space between the rails of such tracks, and, also, the space adjoining and on the outside of such rails for the distance of eighteen inches in width, shall be paved with like blocks of stone, wood, granite, or other material, in the same manner, and for the same distance, lengthwise, that the balance of the street, or part thereof, may be paved."

The information conforms to the ordinance, and charges that the defendant, as president of the Jackson County Horse Railroad Company, did keep, operate, and maintain a horse railroad of that company on a certain street in the city, without first having paved and caused to be paved the space between the rails of the track of that railroad with certain specified material. Being tried, the defendant was found guilty and a fine

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assessed against him of one hundred dollars. A like result followed on appeal to the criminal court and defendant appeals here.

This ordinance does not make it the duty of any horse railroad company, or any officer, or servant thereof, to pave the street whereon its cars are operated; and, generally speaking, anything in the nature of an offence or misdemeanor can have no existence, except as the result of the violation of some plainly imposed duty or rule of action prescribed by a competent law-making power. As the ordinance in question prescribes no such duty as the paving of streets by horse railroad companies, it is needless to urge so plain a proposition, as that, no duty required by the ordinance having been violated by the company, no offence could be committed by such company, its officers, or servants, when pursuing their ordinary avocation. In a word, the ordinance proposes to punish that which it has not required to be performed. 1 Bouv. Law Dict., 456, Tit. Crime.

But there are other reasons why the conviction herein cannot stand. The ordinance in question contravenes those provisions which were incorporated in the city charter in 1874, whereby the common council may, by ordinance, direct and control the construction of street railways, and require railroad companies to pave and keep in repair a certain space in the streets over which they are operated; but the same section of the charter contains the express proviso, that "*this section shall not be construed to authorize the city council to amend or in any manner interfere with the franchises heretofore granted to any street or horse railroad company in said city.*" Sec. 8, art. 3. The franchises of the corporation, of which the defendant is president, were granted March 29, 1869, by reason of the ordinance of that date and its acceptance by the Jackson County Horse Railroad company. The fourth section of that ordinance only required that "the space between the rails

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of said track and the street, for a space of two feet on either side and along the line of said track, and, also, all street crossings along the line of said street railroad, shall be kept and maintained in good repair by said railroad company." The results flowing from this ordinance and its acceptance was the creation of a contract by and between the city and the accepting company, which contract the city could not, by any subsequent ordinance, affect or impair. The city, under the terms of the contract-creating ordinance, might compel the company to keep and maintain the specified portions of the street "*in good repair*," but beyond this the city authorities could not go, nor the company be compelled to do or perform. These points were thus expressly ruled at the last term of this court, where the obligatory force of the same ordinance underwent extended discussion. *State ex rel. City of Kansas v. The Corrigan Consolidated Street Railway Company*, 85 Mo. 263.

As, under the ordinance of 1869, the city council could do no more than require the company to keep portions of the street "*in good repair*," it stands to reason that any subsequently passed ordinance requiring the company to pave such portions of the street with certain materials, or to punish any one concerned for operating the cars of such company on such street, where the paving required was not done, is not and cannot be, while contracts are respected, and vested rights regarded of any legal force or validity whatsoever.

We reverse the judgment and discharge the defendant. All concur.

the State ex rel. Albers v. Horner.

THE STATE *ex rel.* ALBERS *et al.* v. HORNER, *Judge,*
Appellant.

1. **Practice : NEW TRIALS.** There is no limit to the number of new trials the trial court may grant either party, where they are allowed on account of errors committed in giving or refusing instructions, or in admitting or excluding evidence.
2. ——— : ———. Nor is there any limit to the number of new trials which may be granted when the jury err in a matter of law, or where they are guilty of misbehavior. R. S., sec. 3705.

Appeal from St. Louis Court of Appeals.

REVERSED.

Noble & Orrick for appellant.

(1) The statute, regarding new trials, does not apply to a new trial which is granted for error of the trial court in giving instructions to the jury, and where such error has induced an erroneous verdict, such new trial is not counted. *Boyer v. Smith*, 16 Mo. 351. The facts in this case are different from those in *State ex rel. Wright v. Adams*, 76 Mo. 606. (2) The issues in this case were substantially changed, after the first trial and before the last one, by amendment of plaintiff's petition, and the last trial was had on the issues as made by the amended petition and answer, and the statute in relation to new trials did not apply. (3) It must appear affirmatively in the pleadings from facts stated that the court improperly granted the second new trial, otherwise the writ must be denied. *State v. Governor*, 39 Mo. 400; *Curry v. Coblins*, 37 Mo. 330; 68 Mo. 48; 65 Mo. 489.

W. C. Marshall for respondent.

The new trial granted in the second instance was not

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asked upon either of the grounds warranted by the statute, and the court had no power to grant it for any other reasons. *State ex rel. Wright v. Adams*, 76 Mo. 606.

NORTON, J.—This case is before us on defendant's appeal from the judgment of the St. Louis court of appeals, awarding a peremptory writ of mandamus to compel W. H. Horner, judge of the circuit court of the city of St. Louis, to enter up judgment on the verdict of a jury in the case of *C. H. Albers et al. v. Banking House of Bartholow, Lewis & Co.*, pending in said court. The application for the writ is based upon the following facts, viz.: The said cause was tried in said court in June, 1877, the jury returning a verdict for plaintiffs, assessing their damages at \$1,500, which verdict was set aside and a new trial granted to defendant; that in the year 1879 the cause was again tried in said court, resulting in a mis-trial, the jury failing to agree; that thereafter, on the twenty-second day of March, 1881, the cause was again tried in said court before a jury, which terminated by the jury returning into court a verdict for plaintiffs, and assessing their damages at \$3,500, which verdict was received by the court; that thereafter defendant filed a motion to set aside said verdict and grant a new trial, whereupon the court entered an order to the effect that the motion would be overruled, if plaintiffs within five days would enter a *remittitur* for the sum of \$1,500, and if said *remittitur* was not so entered, the motion would be sustained. This proceeding was instituted to compel said judge to enter up judgment on the verdict as returned by the jury.

That mandamus in such a case is the appropriate remedy, is established by the following cases: *Hill v. Wilkins*, 4 Mo. 86; *Boyce v. Smith*, 16 Mo. 317; 41 Mo. 517; *State ex rel. v. Wright*, 76 Mo. 605. The respondent, in his return to the alternative writ, sets up the fact that

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he sustained the first motion for a new trial on the verdict rendered in 1877, on the sole grounds that the instructions given by him at the instance of plaintiff were erroneous, and misled the jury; and that this was well understood at the time from a written opinion then delivered. To this return a demurrer, which admitted the facts therein stated, was interposed, which was sustained, and the mandatory writ awarded. And it is from this action that respondent has appealed. The relators, to sustain this action of the St. Louis court of appeals, invoke section 3,705, Revised Statutes, which provides as follows: "Only one new trial shall be allowed to either party, except: First, where the triers of the fact shall have erred in a matter of law; second, when the jury shall be guilty of misbehavior."

We are of the opinion that this statute puts no limit to the number of new trials a circuit judge may grant either party when the new trials are granted on account of errors committed by him in giving or refusing instructions, or in admitting or rejecting evidence. Nor does it put any limit upon the number of new trials he may grant when the jury err, either in a matter of law, or where they are guilty of misbehavior. From the earliest history of jurisprudence, in this state, to the present time, this court has not only recognized the right, but declared it to be the duty of the circuit judge to correct his own errors committed in the conduct of a cause tried before him, and in recognition of this we have invariably held in numerous cases that when evidence is received or rejected, or instructions are given or refused, over the objections of a party made at the time, that this court will not, on appeal or writ of error, notice such objections, unless the error of the court complained of is again brought to the attention of the court, especially, in a motion for new trial, so that the judge may first have the opportunity of correcting his own errors, if any have been committed. We have gone further than this, and in a

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number of cases have held that we will not interfere with a judgment upon the ground that the verdict is against the weight of evidence, one ground of the ruling being that the circuit judge in whose presence the witnesses testified, was in a better position to pass upon such a question than this court.

It is clear, we think, that the said statute invoked by relators was only intended to interdict the granting of a second new trial to the same party only in a case where such party has had one new trial granted to him on other grounds than error committed by the court in the progress of the trial, or on other grounds than that the jury erred in a matter of law, or had been guilty of misbehavior. In speaking of said statute, it was observed by Judge Scott, in the case of *Boyce v. Smith*, 16 Mo. 317, that "in specifying the causes for which a second new trial could only be granted to a party, the statute proceeds upon the supposition that the law has been correctly expounded to the jury, and the statute only applies to those cases in which this has been done." If said statute only applies to those cases in which the law has been properly expounded to the jury, it conclusively follows that it cannot be applied to the first new trial granted defendant in 1877, because the demurrer to respondent's return admits the fact therein stated that such new trial was granted on the sole ground that the law was not properly expounded by the court to the jury. And from this it also necessarily follows that defendants have never had a new trial granted them within the meaning of the said statute, and that the new trial which respondent proposes to grant defendants on the ground that the damages awarded by the jury in the second verdict were excessive, would be in contemplation of said statute the first new trial granted them.

The judgment of the St. Louis court of appeals is hereby reversed and petition dismissed. All concur.

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BAKER, *Appellant*, v. THE SPRINGFIELD & WESTERN
MISSOURI RAILROAD COMPANY.

1. **Trustee, Purchase by of Outstanding Title.** A trustee who holds the legal title for the benefit of another cannot speculate with the trust property. He cannot purchase an outstanding title and hold it for his own use, and it matters not that such title was acquired by purchase at a judicial sale or that it is superior to the one conveyed to him in trust; and this rule is as applicable to a trustee holding the legal title to a railroad for the use of its bondholders as to other cases.
2. ———. Nor can a trustee, who has acquired such outstanding title, require, in an action of ejectment for the railroad, the latter to refund to him the amount paid by him for such title.

Appeal from Greene Circuit Court.—HON. W. F.
GEIGER, Judge.

AFFIRMED.

James Baker pro se.

(1) The rule that a trustee may not purchase the trust property "does not apply to mere naked or dry trustees, who practically have no interest in or power over the estate as trustees, to preserve contingent remainders. When the trustee has no duty to perform, as when one is trustee in fee for another in fee, having no authority over the estate, and standing in no relation of influence over the *cestui que trust*, the person named as trustee may purchase." Perry on Trusts, sec. 199; *Price v. Evans*, 26 Mo. 39; *Kennedy v. Keating*, 34 Mo. 28. (2) In this case the title upon which the suit is based never was in the mortgagor, and hence was not conveyed to the trustees in the mortgage. It had passed to Patrick Hayes by the sheriff's deed. In all the cases referred to in defendant's brief, the trustees were in

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charge of the property, and took advantage of their position to effect the purchases, and, in each case, the title or interest acquired was an interest to which the *cestui que trust* was entitled, and hence are not applicable to this case. (3) The purchase at a sheriff's sale, though made by a trustee, is not invalid. It passes the legal title and the trust, if any exists, is not an express trust. At best it is an implied trust that must be declared by a direct proceeding. *Waddell v. Williams*, 50 Mo. 224.

Wallace Pratt and *C. B. McAfee* for respondent.

It was admitted by the pleadings and otherwise in the record, that the plaintiff, at the time he purchased the premises in controversy, was a trustee in a deed of trust, executed by this defendant to secure an issue of \$200,000 of its bonds, and conveying all the property of the defendant, including that in controversy. If the plaintiff, by the purchase from Hayes, acquired any title to the premises in question, he cannot enforce it against the defendant. The relation of trustee and *cestui que trust* as to this property prohibits him. He can only hold the title he may have so acquired for the benefit of his *cestui que trust*, with the right to reimbursement under certain circumstances. 2 Perry on Trusts, sec. 749; *Grumley v. Webb*, 44 Mo. 444; *Rae v. Copelin*, 47 Mo. 76; *Lais v. Sternberg*, 50 Mo. 124; *McAllen v. Woodcock*, 60 Mo. 174; *Sherwood v. Saxton*, 63 Mo. 78; *Roberts v. Mosely*, 64 Mo. 507.

BLACK, J.—Ejectment for property in Greene county described as follows: "All that certain railroad and its appurtenances, beginning at a point in the city of Springfield and extending thence in a northwestern direction to Ash Grove, being about twenty miles." The property sued for is a part of the road bed of the old Kansas City and Memphis railroad, a branch of the Hannibal and

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St. Joseph railroad. The "executive construction and managing committee" appointed, or rather confirmed, by the Hannibal & St. Joseph Railroad Company, received subscriptions to a large amount to aid in the construction of the branch road, and one of its members expended over \$200,000 in grading and masonry in the preparation of the road bed from Springfield, in Greene county, to Greenfield, in Dade county. Out of the twenty-two miles graded in Greene county the right of way was procured to the branch road for five miles only and that in detached parcels. This work was done in 1870, 1871 and 1872.

Nothing further appears to have been done in the way of construction by the branch road. A new corporation, The Kansas City and Memphis Railroad Company, was organized to build a road over the same route. The executive committee of the branch road in 1872 and 1873 assigned, or undertook to assign, and transferred to the new organization the property rights, subscriptions, etc., of the branch. The new company in April, 1875, conveyed the road bed to Shepard and others, who, in September of that year, sold the same to defendant, a corporation organized to build a road from Lamar in Barton county by the way of Greenfield to Springfield. Thereafter the defendant procured to itself the remainder of the right of way, repaired and completed the grading and masonry, tied, ironed and put the road in operation. To raise money to prosecute this work defendant, on the first of January, 1878, made a deed of trust on all of its property to James Baker, the plaintiff here, and Mr. Wells, to secure an indebtedness of which there is outstanding some \$200,000. On July 28, 1876, James Hayes recovered a judgment against the Hannibal & St. Joe Railroad Company for \$18,000 on account of a grading contract, to be levied only of the property of the branch road, the Kansas City and Memphis railroad. By virtue of an execution issued thereon these eighteen

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or twenty miles of said road bed sued for were sold to Patrick Hayes in November, 1876, and in February, 1879, he conveyed the same to the plaintiff. This was after the plaintiff became trustee for defendant and its bondholders in the deed of trust before mentioned.

The statement of the case would lead to the inference that the plaintiff's purchase was intended to be for the benefit of the defendant. The contention, however, is that he is only a dry trustee with no duties to perform and may purchase and assert an outstanding title. It is true these trustees have no active duties to perform so long as the interest and principal of the debt is paid. The bonds, however, are designed to pass from hand to hand in the market and are doubtless held by many persons scattered throughout the country. Any of the holders of these bonds to the amount of ten thousand dollars, in case of default, may call upon the trustees to sell. By the terms of the deed these bonds, were issued to raise money to construct the road, and for the better security the trust covers the franchises as well as all of the property of the company. Express stipulation of the deed is that the defendant shall remain in the possession, use and management of the road and its appurtenances so long as there is no default in payment of the principal or interest. The ability of the defendant to pay the interest and debt must depend upon the continued use of its entire line. To deprive it of the eighteen miles out of the sixty-five is to practically destroy the whole line. The trustees holding the franchises, as they do, owe a duty to the public as well as to the defendant and bondholders. Generally, a trustee who holds the legal title for the use of another will not be permitted to speculate with the trust property. He cannot purchase an outstanding title and assert and hold it for his own use. It makes no difference in his favor that the title acquired was purchased at a judicial sale, nor that it is superior to the title conveyed to him in

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trust. *Roberts v. Moseley*, 64 Mo. 507; *McAllen v. Woodcock*, 60 Mo. 174; *Lass v. Sternberg*, 50 Mo. 124.

In *Perry on Trusts* (sec. 749), it is said with respect to trustees for bond holders in the class of cases now under consideration: "They should not acquire interests or put themselves in positions or relations which are antagonistic or hostile to the interests of the bondholders." We see no reason why this cause should be taken out of the general rules before stated. Reason and authority are against the right of the plaintiff to assert his title, if any he acquired through the sheriff's sale, in hostility to the defendant.

Other questions are presented by this record, all of which have been duly and fully considered, but the conclusion above stated must determine this cause and it is deemed unnecessary to further discuss them. Affirmed. All concur.

On motion for re-hearing.

BLACK, J.—We see no good reason why this cause should be opened for re-argument. We are asked, in the event the court should deny a re-hearing, to so modify the judgment as to require the defendant to refund to plaintiff the purchase money paid by him to Hayes. This is simply an action of ejectment. The defendant asks no affirmative relief against the plaintiff. The relief which the plaintiff now asks is not prayed for in any of his pleadings. And if it had been it could not be afforded in this form of action. This being so we have not, nor do we now regard it, proper to determine whether Hayes acquired any title to the five detached miles of road bed, or to any part of the property sued for, or whether plaintiff, by his purchase, acquired anything of value to the defendant. The motion is overruled. All concur.

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FRANCE, *Appellant*, v. THOMAS.

Mortgage: AFTER-ACQUIRED PROPERTY: LEGAL TITLE: EQUITY. A mortgage of chattels not *in esse*, or not owned by the mortgageor at the execution of the mortgage, will not pass the legal title to such after-acquired property, and the mortgagee, to render his lien effectual, must assert it in a court of equity.

Appeal from Buchanan Circuit Court.—J. B. THOMAS, Esq., Special Judge.

AFFIRMED.

Doniphan & Reed for appellant.

(1) The deed of trust gave a lien upon all the personal property in the hotel, and upon all thereafter purchased and placed therein, and the lien is valid as to such after-acquired property. *Wright v. Bircher*, 72 Mo. 179; *Frank v. Playter*, 73 Mo. 672; *Rutherford v. Stewart*, 79 Mo. 216. And this is true, even although the mortgagee has not taken possession of the property. Jones on Chattel Mortgages, sec. 170. (2) Nor is the mortgagee compelled to assert his lien in a court of equity. *Basye v. Ambrose*, 28 Mo. 44; 21 N. Y. 499; *Thompson v. Foerstel*, 10 Mo. App. 298; *Frank v. Playter*, 73 Mo. 672; Jones on Chattel Mortgages, secs. 12, 13; *Wright v. Bircher*, 72 Mo. 172; *Sawyer v. Gerrish*, 70 Me. 254; *Page v. Gardner*, 20 Mo. 513; *Scharfenburg v. Bishop*, 35 Ia. 66. (3) In equity, a mortgage of after-acquired chattels may be enforced against all having actual or constructive notice of it. Record notice is sufficient. Jones on Chattel Mortgages, secs. 157, 173, 174; *Gregg v. Sandford*, 24 Ill. 17; *Duke v. Strickland*, 46 Ind. 494; *Scharfenburg v. Bishop*, 34 Iowa, 60; *Brown v. Allen*, 35 Iowa, 306; 1 Baxter, 375; *Parkist v.*

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Alexander, 1 John. Ch. 399-400, side pages; *McClurg v. Phillips*, 57 Mo. 214; *Harrington v. Fortner*, 58 Mo. 468; 14 B. Monroe, 278-284; *Mitchel v. Winslow*, 2 Story's Rep. 647. (4) After default, the mortgagee being entitled to possession of the property, the officer has no right to seize it, although it be found in the possession of the mortgageor, such possession being permissive merely and not a matter of right. The bare possession of a chattel by a mortgageor, with the consent or permission of the mortgagee, and determinable at his will, is not the subject of sale under the execution. *King v. Bailey*, 8 Mo. 332; *Foster v. Potter*, 37 Mo. 529; *Teldell v. Stemmans*, 15 Mo. 443; *Boyce v. Smith*, 16 Mo. 317; *Paul v. Hayford*, 22 Me. 234; *Farrell v. Hildreth*, 38 Barb. 178; *Galen v. Brown*, 22 N. Y. 39; *Campbell v. Leonard*, 11 Iowa, 489; Freeman on Executions, sec. 117. (5) After default, the trustee in the deed of trust has the right to recover possession. *Lacey v. Giboney*, 36 Mo. 320; *Pace v. Pierce*, 49 Mo. 393. And in some states, if the property is levied upon by an execution creditor, before default, the mortgagee may maintain replevin. *Ashley v. Wright*, 19 Ohio St. 291; *Quinn v. Schmidt*, 91 Ill. 84.

B. R. Vineyard for respondent.

This was an action at law to recover possession of certain personal property described in the petition. It was tried as such before a jury, and the plaintiff complains of the giving and refusing of instructions. The defendant was sheriff of Buchanan county, and had seized, under special executions in his hands, issued on judgments for the purchase price thereof, the goods in controversy. In law, and in all proceedings at law, the mortgage of property to be afterwards acquired, is void as against third parties, unless, when acquired, it is

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reduced to possession by the mortgagee before the rights of such third parties intervene. Jones on Chattel Mortgages, sec. 164; *Looker v. Peckwell*, 38 N. J. Law, 253; *Moody v. Wright*, 13 Met. 17; *Barnard v. Eaton*, 2 Cush. 294; *Griffith v. Douglas*, 73 Me. 532; *Chesley v. Josselyn*, 7 Gray, 489; *Jones v. Richardson*, 10 Met. 481; *Henshaw v. Bank*, 10 Gray, 568; *Otis v. Sill*, 8 Barb. 102. See, also, 1 Pom. Eq., sec. 165; 3 Pom. Eq., secs. 1233, 1288; *Mitchell v. Winslow*, 2 Story, 638; *Milliman v. Neher*, 20 Barb. 37; *Hunt v. Bullock*, 23 Ill. 320; *Hamilton v. Rogers*, 8 Md. 301; *Chynoweth v. Tenney*, 10 Wis. 397; *Single v. Phelps*, 20 Wis. 398; *Gale v. Burnell*, 7 Q. B. 850; *Lunn v. Thornton*, 1 C. B. 379; *Robinson v. McDonnell*, 5 M. & S. 228; *Head v. Goodwin*, 37 Me. 187. In quoting from the leading case in this country, of *Mitchell v. Winslow*, 2 Story, 630, in regard to the right of such mortgagees in equity, though the language of Judge Story is not correctly quoted, the Supreme Court of Missouri (*Rutherford v. Stewart*, 79 Mo. 218, at top), is careful to add: "Judge Story, it will be observed, is speaking of an equitable lien."

G. P. Wanty, also, for respondent.

(1) He advanced the money before this property was in existence, and if he obtained a lien upon it, that lien attached when Richmond acquired title, and must have been for the precedent debt, and Donnell cannot be a *bona fide* purchaser. *Weaver v. Barden*, 49 N. Y. 291; *Car v. White*, 52 N. Y. 138; *Barnard v. Campbell*, 55 N. Y. 456; *Barnard v. Campbell*, 58 N. Y. 73; *Root v. French*, 13 Wend. 571; *Johnson v. Peck*, 1 Woodbury and Minot, 334; *Loyd v. Brewster*, 4 Paige, 537; *Ratcliff v. Sangton*, 18 Md. 390; *Field v. Stevens*, 42 Vt. 106; *Goodman v. Simmonds*, 19 Mo. 106; *Logan v. Smith*, 62 Mo. 458. (2) The property was not in the hands of Donnell, or plaintiff, but was in the hands of the pur-

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chaser. Not only did plaintiff not have possession, but he does not show that he had any right to reduce the property to possession. No condition of the trust deed appears to have been broken, and Richmond had the right to deal with the property as his own, and his interest therein could be sold on execution. *Foster v. Potter*, 37 Mo. 532; *Woods v. Hilderbrand*, 46 Mo. 284; *Sheble v. Curdt*, 56 Mo. 437; *Barnett v. Timberlake*, 57 Mo. 499.

HENRY, C. J.—This is a suit to recover specific personal property seized by the defendant, as sheriff of Buchanan county, under an execution against Samuel A. Richmond. Plaintiff claims the property under a deed of trust executed by said Richmond and wife on the twenty-eighth day of September, 1881, to plaintiff, as trustee, to secure a note for \$30,000, executed by said Richmond and payable to Robt. W. Donnell, of the city of New York, and conveying for that purpose a certain tract or parcel of land in the city of St. Joseph, on which there is, and, at the date of the seizure of said goods, was, a hotel building and all the furniture, carpets, fixtures, beds, bedding, linen, tableware, cutlery, glassware, queensware, plate, bar room fixtures and furniture, wines and liquors, cigars, and stores, then, or thereafter, to be placed in said hotel, and all the appurtenances, appliances, and fixtures of whatever nature then, or thereafter, placed in said hotel.

It appears that in September, 1881, Dr. Richmond borrowed of Donnell \$30,000 to pay off a mortgage on the hotel property and furnish the house. Retaining \$10,000 to pay off a mortgage, and \$3,000 commission, Donnell procured Donnell, Lawson and Simpson to give Richmond a general letter of credit for \$17,000 on September 7, 1881. The mortgage in question was executed September 28, 1881. They supposed that \$20,000 would be sufficient to furnish the hotel, but instead of that

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amount, \$47,000 or \$48,000 were expended for that purpose, and the goods placed in the hotel. Some of the goods were purchased before and a portion after the execution of the mortgage. The language of the mortgage is broad enough to cover all the furniture, fixtures, etc., bought to fit up and furnish the hotel.

The judgment creditors, under whose executions the property in controversy was seized, acquired no lien upon the property until their executions were levied. Each was upon the identical property for which the debt it represented was contracted. Neither the mortgagee nor the trustee ever had possession of the goods under the mortgage. In *Wright v. Bircher*, 72 Mo. 179, and *Rutherford v. Stewart*, 79 Mo. 216, this court held that similar mortgages to the one under consideration gave the mortgagee an equitable lien upon the subsequently acquired goods, but has never gone so far as to hold that, by such a mortgage, the legal title to the after-acquired goods passed to the mortgagee. The authority principally relied upon in those cases was that of *Mitchell v.*

Winslow, 2 Story, 630, in which Judge Story held that a contract for a lien upon property not *in esse*, created an equitable lien. To the same effect is the leading English case of *Holroyd v. Marshall*, 10 H. L. Cases, 192; *Belding v. Reed*, 3 Hurlstone & Coltman, Exch. Rep. 961, followed *Holroyd v. Marshall*, and arose under a mortgage similar to the one under consideration. To the same effect is *Reeve v. Whitmore*, 4 DeG., J. & S. 1; *Wright v. Bircher*, and *Rutherford v. Stewart*, *supra*, were suits in equity. A recent English case, *Hallas v. Robinson*, of which the syllabi will be found in the Central Law Journal, May 29, 1885, seems to be in full accord with the other English cases. The great weight of authority, both in the United States and in England, supports the view that a mortgage of chattels not *in esse*, or not owned by the mortgageor at the execution of the mortgage, will not pass the legal title to the property,

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and can only be made effective, (unless the mortgagee has acquired the possession under the mortgage,) by a proceeding in equity against the mortgageor, or persons claiming under or through him, who had notice of the equity of the mortgagee before their title or liens attached.

Cases might be conceived, which would be exceptions from the rule, as, for instance, where the execution of the mortgage and the acquisition of the property are constituents of the contract, and are so nearly connected in point of time as to become parts of the same transaction. But this is not such a case. It follows, therefore, that the plaintiff had not a title upon which he could recover at law. If the suit were one seeking to enjoin the sale of property under the executions, other questions discussed in the brief of counsel would have to be considered, but in the view we take of the case, it is unnecessary to pass upon them.

The judgment of the circuit court, which was for the defendant, is affirmed. All concur.

THOMPSON *et al.* v. ALLEN *et al.*, *Appellants*.

Jurisdiction: PROCESS: PRACTICE. Where an original petition states a cause of action against individuals, as constituting a co-partnership, and the amended petition states one against a corporation, the latter, before the court can have jurisdiction to render judgment, must be in court on voluntary appearance, or be brought in by service of process, and this is the case, although the firm name was the same as that of the corporation, and the stockholders in the latter composed said firm.

Appeal from Jasper Circuit Court.—JAMES R. SHIELDS, Esq., Special Judge.

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REVERSED.

Harding & Buller for appellants.

(1) It was error to make the decree against the defendant corporation, without the service of summons, or its appearance to the action. The corporation could not be brought into court by suing its stockholders. *Angell & Ames on Corp.*, secs. 40, 46, 100, 591; *Gerard B. Allen Co. v. Frumet, etc.*, 73 Mo. 62. The fact that the name of the corporation was the same as that of the firm, and that the stockholders therein were the members of the firm, can make no difference. In the eye of the law the firm and the corporation are two different persons. (2) The trial court erred in excluding the evidence of Daugherty, offered by defendants, to show the abandonment of the contract by plaintiff's grantors. (3) Plaintiffs were guilty of such laches in enforcing their contract as to bar a decree in their favor. *Moorman v. Talbott*, 55 Mo. 399; *Twin Lick Oil Co. v. Marberry*, 94 U. S. 587; *Landrum v. Bk.*, 63 Mo. 54; *Mallock v. Todd*, 25 Ind. 128; *Harwood v. Ry.*, 17 Wall. 78. (4) Plaintiff's amended petition is a total departure from the original cause of action. *Fields v. Malary*, 78 Mo. 172.

Joseph Cravens for respondents.

(1) The Carterville Mining and Smelting Company was properly in court. In the case in hand, Allen, McMillin, Davy and Daugherty, are designated first, as a co-partnership, then by amending the petition, they are designated as a corporation, all other facts and allegations, as originally stated and made, remain the same in every particular, and the change of designation did not "substantially change the claim or defence." A corporation may have one name by which it may take and

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grant, and another by which it may plead and be impleaded. Angell & Ames on Corp. (10 Ed.) sec. 100; *Beattie v. Hill*, 60 Mo. 72; *House v. Duncan*, 50 Mo. 453. (2) There was, under the evidence, no abandonment of the lot in controversy. *Dowzelot v. Rawlings*, 58 Mo. 75; Greenl. Evid., secs 95, 527; 64 Mo. 245. There was no laches to forfeit the contract.

NORTON, J.—This suit was brought on the sixteenth day of October, 1881, against C. C. Allen, Thomas M. Davy, William McMillin, and W. A. Daugherty, as partners doing business under the firm name of the Carterville Mining and Smelting Company, for the specific performance of a contract alleged to have been made by them on the twelfth day of September, 1876, with the grantors of plaintiffs, for the conveyance of a certain lot in the town of Carterville, Jasper county. A trial was had at the November term of court, 1883, during the progress of which it appeared that the alleged contract was made with a corporation, known as the Carterville Mining and Smelting Company, which company was not a party to the suit. After the evidence on both sides had been put in, clearly showing that the plaintiffs had no right to a judgment against the defendants then before the court, plaintiffs were allowed to file an amended petition, making the Carterville Mining and Smelting Company defendant, and alleging that the said Allen, Davy, Daugherty and McMillin were doing business as a corporation, and that the corporation executed the contract, the specific performance of which was asked for. To this petition, Allen *et al.* demurred, which was overruled, and the court then proceeded without either notice to, or the voluntary appearance of, the Carterville Mining and Smelting Company, to render its decree for specific performance against said company, awarding in its decree two thousand dollars damages for mineral taken from said lot. From this decree defendants have appealed.

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The judgment must be reversed, because the Carterville Mining and Smelting Company was not before the court, either by service of summons or voluntary appearance, and the court, therefore, did not have jurisdiction to render judgment against it. The fact that Allen and others were sued as individuals, composing a firm, were the incorporators, members and officers of the corporation, did not dispense with the necessity of having the corporation brought into court, either by summons or voluntary appearance. *G. B. Allen & Co. v. Frumet M. & S. Co.*, 73 Mo. 688; *Angell & Ames on Corp.*, secs 40, 46, 100, 591. "The fact that the name of the corporation was the same as that of the firm, and that the stockholders therein were the members of the firm, can make no difference. In the eye of the law, the firm and the corporation are two different persons." 73 Mo. 694.

The original petition stated a cause of action against individuals, the amended petition stated a cause of action against a corporation, and for this reason the demurrer of Allen and others ought to have been sustained and the cause regularly proceeded with against the corporation. The evidence of Daugherty, offered on the trial and excluded, tending to show that the contract for the purchase of the lot had been canceled and abandoned, was clearly admissible under the ruling of this court in the cases of *Fulkerson v. Thornton*, 68 Mo. 468, and *Butts v. Phelps*, 79 Mo. 302. Error was also committed in excluding the evidence of Wilson, offered in cross-examination, as to the expensiveness and length of time required in draining and developing the mineral land mentioned in his evidence, and the cost of getting out lead ore. This evidence was admissible as bearing on the question of whether the purchasers of this lot were guilty of such laches as not to authorize specific performance. *Moorman v. Talbott*, 55 Mo. 392; 63 Mo. 54.

Judgment reversed and cause remanded. All concur.

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HARRIS et al., Plaintiffs in Error, v. Ross.

1. **Statute of Limitations: DISABILITY OF MINORITY: DISAFFIRMANCE OF DEED BY HEIRS.** Where a married woman, who is a minor, with the concurrence of her husband, conveys land which descended to her from her ancestor, and dies before attaining her majority, leaving as her sole heir the plaintiff, also a minor, the latter is vested with the right to disaffirm such conveyance, and has the statutory period of three years after attaining her majority within which to do so, and the institution of an action within such time for the recovery of said land is a valid disaffirmance of the conveyance.
2. ——— : ——— : ———. The conveyance of the grantor and her husband was effectual to pass the title during their joint lives, or during his life, if a tenant by curtesy, and the wife not having survived the particular estate, no cause of action ever accrued to her, and the statute of limitations never commenced to run in her favor; the heir, therefore, was the first person entitled to sue, and against whom the statute first began to run, and, being an infant, she had the full statutory period within which to disaffirm the deed and commence her action.

Error to Morgan Circuit Court.—HON. E. L. EDWARDS,
Judge.

REVERSED.

R. F. Buller for plaintiffs in error.

(1) A conveyance made by a minor may be avoided in various ways; among others, by bringing an action of ejectment for the recovery of the land at any time within the period of the statute of limitations. *Cole v. Pennoyer*, 14 Ill. 158; *Chadburn v. Radcliff*, 30 Me. 354; 1 Am. Lead. Cases (4 Ed.) 256, and cases cited; Schouler Dom. Rel. 585; Tyler on Infancy and Coverture, 67; Reeves' Dom. Rel. 372, and note. And in this state the period is not less than three years after attaining majority, and

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may be ten years, depending on the age of the party when the conveyance is made. 1 R. S., sec. 3222; *Peterson v. Laik*, 24 Mo. 544; *Caho v. Endress*, 68 Mo. 224, and cases cited; *Huth v. Carondelet*, 56 Mo. 203. And no previous act of disaffirmance is necessary before bringing ejectment. *Chadburn v. Radcliff*, 30 Me. 354; *Cole v. Pennoyer*, 14 Ill. 158; 1 Am. Lead. Cases, 256; *Youse v. Norcum*, 12 Mo. 549; *Peterson v. Laik*, 24 Mo. 541; *Jackson v. Carpenter*, 11 Johns. 538. And this is especially the case in reference to the disaffirmance by a married woman. *Magee v. Welch*, 18 Cal. 155. And such disaffirmance may be by the heir of a deceased minor. *Ferguson v. Bell*, 17 Mo. 347, 351. Previous to the revision of 1865, a woman under twenty-one was a minor. *Caho v. Endress*, 68 Mo. 224, 228. (2) Plaintiff's mother never had a right of action to recover the possession of the land, and plaintiff had none until the death of her father, in 1861, and she was then a minor and still had three years after attaining her majority. *Dyer v. Bannock*, 66 Mo. 422; *Valle v. Obenhauser*, 62 Mo. 81; *Carr v. Dings*, 54 Mo. 95; *Miller v. Bledsoe*, 61 Mo. 96; R. S., sec. 3223. (3) A married woman who is a minor need not refund before maintaining ejectment in avoidance of her deed. *Dill v. Bowen*, 54 Ind. 204; 2 Cent. Law Journal, 343; Reeves' Dom. Rel. 371, and note; *Curry v. Barton*, 32 Mich. 30; 15 Gratt. 329; 27 Vt. 268; 110 Mass. 399; 6 Gray, 282. (4) As the law stood in 1857 and 1858, Caplinger, the husband, had the right to the possession of his wife's land, which right he could and did convey, and such conveyance deprived his wife and her heirs of all right of action for the possession until his death, in August, 1861, and this, whether he was tenant by the courtesy initiate or not. *Bryan v. Wear & Hickman*, 4 Mo. 106; *Valle v. Obenhausen*, 62 Mo. 81; *Brown v. Moore*, 74 Mo. 633; *Beal v. Harman*, 38 Mo. 435.

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T. M. Rice for defendant in error.

(1) Curtesy is an estate to which, by law, a man is entitled, on the death of his wife, in the lands of which during the coverture, she was seized, provided they have had birth of issue, alive, capable of inheriting. Bouvier's Law Dictionary. Curtesy initiate implies birth of issue, and until the birth of issue, there can be no curtesy initiate. Bouvier's Law Dictionary; 1 Wash. on Real Property (3 Ed.) 166. Thomas J. and Martha Caplinger's deed to property in dispute, was made July 27, 1857; the plaintiff, Nancy, was born October 5, 1857, some three months after the date of the deed. So that it is not true, as assumed by plaintiff, that plaintiff's father, at the date of the deed, was a tenant by the curtesy initiate. His rights at the date of the deed were merely inchoate. (2) The deed to Masters, from Martha A. Caplinger, was not void, but only voidable. Tyler on Inf. & Cov., sec. 14; *Ferguson v. Bell*, 17 Mo. 347; *Baker v. Kennett*, 54 Mo. 82. (3) Martha Caplinger's deed to Masters conferred upon him, if not a rightful legal title, in form, an absolute title, and, coupled with continuous adverse possession, is sufficient to sustain the statute of limitations. *Teller v. Burtis*, 9 Johns. 174; *Young v. Ellis*, 13 Johns. 118; *Gilliland v. Woodruff*, 1 Conn. 276; *Honebert v. Trinity Church*, 24 Wend. 587. And it has been held that possession, under a void deed, with claim of title, is sufficient to give effect to the statute of limitations. *Society of Cincinnatus v. Osborn*, 2 Ala. L. J. 457; *Hilton v. Bender*, 2 Han. (4 S. C.) 270; *Hall v. Low*, 102 U. S. 461. A deed, to constitute color of title, must, apparently, transfer title. *Coleman v. Beings*, 89 Ill. 183; *Mulford v. LeFrank*, 26 California, 88.

RAY, J.—This is an action of ejectment for the undi-

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vided one-half of the northwest quarter of the southwest quarter of section eighteen, township forty-two, range sixteen, in Morgan county, Missouri. The petition was in the usual form, alleging, among other things, that plaintiffs were husband and wife, and that the real estate in question belonged to the wife, Nancy Harris. The suit was brought in the Morgan circuit court, August 20, 1878. The answer, in addition to a general denial, set up the statute of limitations in bar of the action. The replication, in answer to the new matter set up in the answer, alleged that the plaintiff, Nancy Harris, is the real owner of the land, and that she was a minor, under age, until within three years next before the bringing of this action, and that the statute of limitations is no bar to her recovery.

The material facts of this case, as gathered from the record, are as follows: That one Martha Caplinger, the wife of Thomas Caplinger, is the common source of title; that she was seized, in fee, of the undivided one-half of the land in controversy at the date of her marriage with her husband, Caplinger; that there was born of this marriage one child, only, to-wit, Nancy Harris, the plaintiff in this action, who was born October 5, 1857; that said Martha Caplinger, the mother of said plaintiff, Nancy, was born March 23, 1838, married Thomas Caplinger October 22, 1856, and died in June, 1858, being at the date of her death a minor, under twenty-one years of age; that on July 27, 1857, some three months before the birth of her said daughter, Nancy, the plaintiff, said Martha and her husband (in conjunction with her brother, William French, who was seized of the other undivided half of said land), joined in a deed of general warranty for the land in suit to one Masters, under whom the defendant, by mesne conveyances, claims title to the whole of said land; that said Thomas Caplinger, the husband of said Martha, survived his wife, and died August 10, 1861; that defendant, shortly after said conveyance to

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Masters, took possession of said land, and has occupied the same continuously ever since, under claim and color of title, for a period of some twenty-one years; and that the plaintiffs were married in 1874; from all which it appears that the plaintiffs claim in right of the wife, Nancy, who claims to have inherited an undivided half of said land from her mother, Martha Caplinger, who died under coverture and a minor; and that defendant claims title to the whole tract under and by virtue of the said deed of said Martha and Thomas Caplinger, and her said brother, William French, to said Masters, made in July, 1857, as aforesaid, and, also, by adverse possession under the statute of limitations. It, also, further appears that plaintiffs claim the right of the wife to avoid said deed of her mother, by reason of her minority at the date of its execution, and, further, that the statute of limitations does not run against her, by reason of her minority.

The case was tried by the court, and after the introduction of testimony tending to establish the material facts hereinbefore set out, the court refused, among others, the following declarations of law, asked by the plaintiff:

"1. That if the court believed from the evidence that Isaac C. French died on July 20, 1838, owning the land in controversy, leaving two children, only, William L., born March 6, 1837, and Martha A., born March 23, 1838; that said Martha A. married Thomas J. Caplinger October 22, 1856, and died in June, 1858, and left surviving, her husband, who died August 10, 1861, and one child, the plaintiff Nancy, born October 5, 1857, and who was married to plaintiff, George T. Harris, in 1874, the court would find the issues for the plaintiffs, notwithstanding the court might further believe from the evidence that on the twenty-seventh of July, 1857, the said Martha and her husband made a conveyance of her undivided interest in the land to Andrew Masters, and that

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defendant had been in possession ever since, claiming under said Masters."

"2. That if the land descended to plaintiff Nancy's mother, while she was a minor, and that she died before she came of age, and plaintiff, Nancy, was a minor when her mother died, and not twenty-one years of age when this suit was brought, then adverse possession since 1857 or 1858 was no bar."

The court gave, among others, the following declarations of law for the defendant:

"1. That if Martha J. Caplinger, at the time of making her deed to Masters, on the twenty-seventh of July, 1857, was a married woman, then the execution and delivery of the said deed created by operation of law a possession of the land in controversy in said Masters, adverse to any claim of said Martha Caplinger, and that if said Martha died in June, 1858, leaving plaintiff, Nancy, as her only heir, and that said Nancy has failed to bring her action for possession of the premises for more than ten years from the date of the said Masters' adverse possession, and more than three years after her mother's death, then the plaintiff is barred by the statute of limitations."

"3. That the only evidence of the revocation of the said deed of Martha Caplinger to Masters is the bringing of this suit on the twentieth of August, 1878, more than twenty-one years after the said deed was made, which was not within a reasonable time, and said deed to Masters, therefore, estops plaintiff."

"4. That if defendant, or those under whom he claims, have been in possession of the land since 1857, under claim of title, the plaintiff cannot recover."

Whereupon the court found the issues for the defendant, and rendered judgment accordingly; and thereupon the plaintiffs, after an unsuccessful motion for new trial, bring the case here, by writ of error.

From the foregoing statement, it appears that Martha

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Caplinger, the common source of title, was, at the date of the deed in question, July 12, 1857, a married woman, under twenty-one years of age; that at the time of her death, in June, 1858, she was twenty years and three months old, lacking nine months, only, of her majority; that she left an only daughter, the plaintiff, Nancy, as her sole heir at law, then an infant some nine months old; that there was no act of disaffirmance, prior to or other than the institution of this suit, on August 20, 1878, and that plaintiff, Nancy, was twenty-one years and three months old when this suit was brought.

On this state of facts, several legal propositions applicable to the case may here be stated, which, upon investigation, will be found, we think, abundantly sustained: That the deed in question was not void, but voidable, only, as to the wife, at her election, upon attaining her majority; but as to the husband, who labored under no disability, it was irrevocable; that the deed was operative and sufficient to pass, and did pass to Masters, the grantee, and those claiming under him, whatever right, seizin, title, and estate said wife or husband, or both of them, may have had to the land in question, at the date thereof; that the estate so transferred was the wife's fee, subject to whatever estate the husband had, under the facts, whether for their joint lives or that of the surviving husband, as tenant by the courtesy, the first of which, if such it was, ceased with the wife's death, in June, 1858, and the second with that of the husband, August 20, 1861; that the title, seizin, and estate so transferred to Masters, and those holding under him, rightfully remained and abided with the defendant, unless divested by some valid act of disaffirmance by the mother or the heir, timely and seasonably made, within a period analogous to that provided in the statute of limitations; that after the execution of the deed, and prior to a valid disaffirmance, the wife, during her life, and the heir after her death, had no title, seizin

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or estate in the land so conveyed, but only the right to disaffirm said deed, and thereby regain the lost seizin and title, and, incident thereto and contemporaneous therewith, the right to maintain an action of ejectment, for the recovery of the possession of the land; that the wife, had she lived, upon attaining her majority, and not before, with the concurrence of her husband, if living, and without him, if not, had the right and power to disaffirm said deed by any of the acts which the law recognizes as valid and sufficient for that purpose; and among those acts is the institution of an action like the present, for the recovery of the land so conveyed by said deed; that at her death, in June, 1858, this right of disaffirmance descended to and vested in the plaintiff, Nancy, as her sole heir at law; and the only question now before us for determination is, *within what period of time* she is, by law, required to exercise the right and power of disaffirmance, so inherited from her mother. Tyler on Inf. and Coverture, pp. 62 to 83, and sections 19, 22, 23, 24, 25, 26, 27, 28, 29, 30; 25 Ill. 132; 5 Ohio St. 252 to 255; 52 Miss. 291; 75 Ill. 315; 2 Kent 195; 14 Ill. 158; 30 Maine, 354; *Peterson v. Laik*, 24 Mo. 541; 50 Mo. 203; 68 Mo. 225; 12 Mo. 550; 56 Mo. 211; 17 Mo. 347; 11 Johns. 539-541; 86 Ind. 88; 18 Cal. 155; 14 Johns. 124; 93 Ind. 423; 122 U. S. Rep. 300.

The question as to the time within which, under the law and the facts, the plaintiff, Nancy, was required to disaffirm the voidable deed of her mother, is by no means free from doubt and difficulty. The mother having died a married woman and in her minority, the time at which alone, under the law, she was empowered to disaffirm the deed never did arrive to her, and, of course, at her death there was, and could be, no disaffirmance of the deed in question. It may be conceded that the mother, had she lived to attain her majority, with the concurrence of her husband, if then living, would have had the right and the power, in several ways known to the law, to

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disaffirm said deed (whether she might, in other ways, without the concurrence of her husband, have then disaffirmed the deed, need not now be determined), and it may be further conceded that if she had then failed to disaffirm the same, within a period analogous to that of the statute of limitations governing real actions (to-wit: ten years), she would have been forever barred of her right and power in the premises. At all events, however, it is quite clear that the plaintiff, Nancy, at her mother's death, as her sole heir at law, inherited this right and power of her mother to disaffirm said deed. But just here the difficulty arises to determine in what time the plaintiff, Nancy, as *heir* of her mother, must exercise this right and power of disaffirmance. Must she do it within the period limited to her mother, had she lived, or is she allowed the full statutory period, after attaining her own majority?

The reason why the mother was not permitted or required to exercise the right of disaffirmance before reaching her majority, doubtless arose from the real or supposed immaturity of her judgment and experience to determine so important a matter. At the mother's death, she wanted nine months, only, of being twenty-one years of age. At the same period the plaintiff was an infant, some nine months old, only. If the mother, at the comparatively ripe age of twenty years, out of regard to her minority, is not required or permitted to disaffirm before attaining twenty-one years of age, it may be asked why the heir, then an infant of nine months, only, should not be allowed the full statutory period after attaining its majority, in which to determine the same matter? The only answer to this question, adverse to the claim of the infant, if any, grows out of the recognized doctrine that, in such cases, one disability cannot be tacked to another, so as to prolong the time, or out of the further fact, if fact it was, that the right and

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power to disaffirm the deed first accrued to the mother. And the question is, does that doctrine, or fact, if such it was, apply under the facts of this case? It is contended for plaintiff, Nancy, that the right and power to disaffirm said deed never did fully accrue to the mother in her lifetime. For her it is insisted that the period at which alone she could disaffirm, owing to her death, never did arise to her. The matured right to disaffirm, it is, therefore, argued, *first* accrued to the *heir* and not the mother. The solution of this question is determinable, we imagine, by analogy, by the rule prescribed in the statute of limitations governing real actions, in sections 3222 and 3224, Revised Statutes of 1879.

Section 3222 provides that, "If any person entitled to commence any action in this article specified, or to make any entry, be, at the time such right or title shall first descend or accrue, either within the age of twenty-one years, * * * or a married woman, the time during which such disability shall continue shall not be deemed any portion of the time in this article limited, for the commencement of such action or the making of such entry; but such person may bring such action or make such entry after the time so limited, and within three years after such disability is removed * * *."

Section 3224 enacts that: "If any person entitled to commence such action, or to make such entry, die during the continuance of any disability specified in section 3222, and no determination or judgment be had of the title, right or action to him accrued, his heirs, or any person claiming from, by, or under him, may commence such action or make such entry after the time in this article limited for that purpose, and within three years after his death, but not after that period."

It may be well to remark, first, without going into details, that actions like this, in important particulars, are unlike and distinguishable from that large class of

cases where title is claimed and created by adverse possession, under the statute of limitations, and for that reason many of the vexed and difficult questions in that class of cases do not arise and have but little or no application to the case at bar. Under these provisions, it is claimed for the defendant that, while the heir may commence such action after the time so limited therein, he must, also, commence the same *within three years* after the ancestor's death, but not after that period. This, the defendant insists, is the plain, manifest, and literal import and meaning of these provisions. If the defendant is correct in this construction of the statute of limitations, it would seem logically and necessarily to follow that the attempted disaffirmance of the deed in question by the heir was not timely and seasonably made, and that the right and power so to do, together with the right to maintain ejectment, incident thereto, was and is barred, by analogy to the rule so provided in the statute of limitations. This conclusion of the defendant, it may be conceded, is correct, *provided* it can be fairly and justly held that the ancestor of the plaintiff, under the facts of the case, was ever entitled and empowered to disaffirm the deed in question. If, in point of fact, no such right and power ever *accrued* to the ancestor, then it would seem to follow that the defendant's conclusion and construction of the statute of limitations is not the correct one, and, in that event, plaintiff's action is not barred.

This, it may be conceded, is the vital question and turning point in the case. In order to its proper determination, it is only necessary, it seems to me, to recur to the fundamental and original proposition in the case; that is, "that the deed in question was not void, but voidable, only, at her election, upon attaining her majority, and not before." It is not pretended that the wife, in her life time, either with or without the concurrence of her husband, could have maintained an action

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of ejectment for the recovery of the land. It is conceded that no such right existed, *prior* to some valid act of disaffirmance of the deed. Under the facts, no such disaffirmance was or could have been performed, in her lifetime. There never was a period during her life when she could have disaffirmed the deed, or even *elected* to do so. How, then, can it be logically or rationally said that any right to disaffirm or maintain ejectment ever accrued to the ancestor, in her lifetime? Such a position seems to me, necessarily, untenable. "Its bare statement furnishes its own refutation." The ancestor, during the whole period of her life, between the date of the deed and that of her death, was, it will be remembered, under double disabilities, that of minority and coverture; her right, however, was based *alone* on that of infancy. She was, also, disabled to sue, if otherwise entitled, during her life, by the force of the deed in question conveying her husband's marital rights to the lands during their joint lives, or if his title was that of courtesy, instead, then during his life as surviving husband. But in no event was she entitled to sue *prior* to some valid disaffirmance of her deed to Masters, under which defendant claimed. The right of the ancestor in its very nature was confessedly *inchoate*, and one which, had she lived the full statutory period of limitation after attaining her majority, she might never *choose* to exercise, and when she died it descended to the plaintiff, Nancy, as her sole heir at law, who was the *first* and only person in or to whom the right did or could *accrue*.

From the moment of the ancestor's death, the *heir* by inheritance was invested with the right of election and disaffirmance, and was the person to whom that right and power *first* accrued, or could accrue; and, being at the time an infant some nine months old, she had, under the law and the facts, the statutory period of three years, after attaining her majority, in which to make her election of disaffirmance and execute the same

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by the institution of this suit, with the concurrence of her husband, which, in itself, was at once a valid disaffirmance of said deed, and the commencement of the appropriate action for the recovery of the possession of the land. Let us suppose, for example, that the ancestor, instead of having the right to disaffirm her voidable deed upon attaining her majority, had possessed a promissory note for one hundred dollars, due and payable to her, separately, or with her husband, twelve months after date, in which she was the meritorious cause of action, and suppose that she or her husband, one or both, had died before the maturity of the note, would any one contend that any right of action accrued on said note during the life of the party so dying? And yet, what is the difference in principle between that case and the one at bar? In either case, it is true, there is a right to be exercised or enforced, but only at a future date, which, under the facts in this case, it is conceded never arose to the party so dying. It is of the essence of the statute of limitations not to run against a party until a right of action has accrued to such party. The statute, strictly speaking, it must be remembered, whether expressly or by analogy, deals only with the right of action, and when there is no such right, there can be no bar. In such case there is nothing for the statute to operate upon, or to set the same in motion.

But waiving all that is heretofore said, there is another view of this case equally fatal to the construction of the statute claimed for the defendant, and wholly independent of the ancestor's right to disaffirm said deed. As hereinbefore stated, but not elaborated, the deed of husband and wife for the land in question vested in the grantee of said deed, and those claiming under him, an outstanding estate, for at least the joint lives of husband and wife, and if the husband's right was that of tenant by courtesy initiate or consummate, then during the life of the surviving husband. In such case, all the

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authorities agree that during the continuance of such particular estate (whether before or after the disaffirmance of said deed), the wife, either with or without the concurrence of her husband, cannot maintain ejectment for possession of said land. *Foster v. Marshall*, 2 Foster, 491; *Jackson v. Schoonmaker*, 4 Johns. 390; *Moore v. Jackson*, 4 Wend. 58; *Mays' Heirs v. Hill*, 5 Littell (Ky.) 307; *Gill & Simpson v. Fauntleroy's Heirs*, 8 B. Monroe, 184, 185; *Mercer v. Selden*, 1 Howard (U. S.) 51, 55; *Sims v. Everhardt*, 102 U. S. Rep. 300; *Witham v. Perkins*, 2 Greenl. 400; *Stubblefield v. Menzies*, 8 Sawyer, 41; *Jackson v. Johnson*, 5 Cowen, 75; *Sims v. Bardoner et al.*, 86 Ind. 87; and the following Missouri cases: *Dyer v. Brannock*, 66 Mo. 392; *Miller et al. v. Bledsoe*, 61 Mo. 96; *Carr v. Dings*, 54 Mo. 95; *Littleton v. Patterson*, 32 Mo. 357, 365; 74 Mo. 633; 72 Mo. 173; 66 Mo. 432; *Poe et al. v. Domic*, 54 Mo. 119, at p. 125.

It is conceded that the wife died during the continuance of this particular estate, or, at least, did not survive it. No cause of action, therefore, ever accrued to her, and the statute never commenced to run against her. The heir, therefore, then an infant nine months old, must, necessarily, be the person first entitled to sue, and against whom the statute first commenced to run. Being an infant, she had the full statutory period in which to disaffirm said deed and commence said suit. Section 3222 of the statute of limitations, by its terms, deals only with persons entitled to commence an action or make an entry, and section 3224 of the same act has no application to the heir of a person not thus entitled. The facts of this case make it peculiar. It differs from the ordinary case of a minor or married woman in whom the title or fee to real estate actually vests, or is vested at the time. Such an infant or married woman, whose real estate is actually possessed and claimed adversely, although excused by reason of minority or coverture, yet such an infant or married woman, with the consent of

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guardian or husband, may, if she choose, commence such action during minority or coverture, and it may be conceded that if such minor or married woman die before such disability is removed, then the heir of such person would be within the purview of section 3224, *supra*, and bound to sue within three years after her death. But that is not this case. Here, the ancestor, from the date of her deed from herself and husband up to her death, while yet a minor, was wholly divested of the title to said real estate. During that time it was not possible for her, by reason of her minority, to disaffirm said deed and thereby regain such title, and without it she was not entitled to commence suit within the meaning of section 3222, *supra*. If that be so, upon her death, her heir, the plaintiff, was not within the purview of section 3224, or obliged to sue within three years after her death, but had the full statutory period in which to commence such action, as before stated.

The doctrine prohibiting the tacking of disabilities does not attach to the transmission of an inchoate right from ancestor to heir, like the one at bar. In order to evoke that doctrine there must have been something more than an incipient or an incomplete right; in other words, something entitling the ancestor to sue, and some failure to do so. In this case there was and could be no failure. It follows, therefore, that the disaffirmance of the deed and the institution of the suit were both timely and seasonably made and commenced, and that plaintiff's right of action was not and is not barred. It also follows that there was error in giving and refusing said instructions, of which it is sufficient to say that upon a retrial they should be so modified as to conform to the views herein expressed. The finding and judgment of the court were also erroneous.

For the reasons above stated, the judgment of the circuit court is reversed and the cause remanded. Henry, C. J., concurs fully; Black and Sherwood, JJ., concur in the result, and Norton, J., dissents.

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MILBURN V. THE KANSAS CITY, ST. JOSEPH & COUNCIL
BLUFFS RAILROAD COMPANY, *Appellant*.

1. **Negligence.** Where, in an action founded on the negligence of defendant, plaintiff's evidence shows that his own negligence directly contributed to produce the injury, he disproves the case alleged, and cannot recover.
2. **Railroad : KILLING STOCK : PUBLIC CROSSING.** In an action against a railroad for the negligent killing of plaintiff's cows by its trains, on a public crossing, mere proof that the speed of the trains was not checked, and that the cattle could have been seen eighty rods off, does not establish defendant's negligence.
3. ——— : ——— : **NEGLIGENCE OF OWNER.** Where the owner of cattle sees them in danger on a railroad track, and can, by reasonable exertion, get them off, he is bound to do so, and if he does not, and they are injured by a passing train, he cannot recover. The owner, in such case, has no right to rely upon the performance of the duty which the law imposes on the company of giving warning signals.

Appeal from Buchanan Circuit Court.—HON. W. H.
SHERMAN, Judge.

REVERSED.

Strong & Mosman for appellant.

(1) The court erred in overruling defendant's demurrer to the case made by plaintiff's evidence: (a) Because there was no evidence that the engineer saw the cows in time to avoid injuring them by stopping the train. *Yarnall v. Ry. Co.*, 75 Mo. 583; *Frick v. Ry. Co.*, 75 Mo. 608; *Zimmerman v. Ry. Co.*, 71 Mo. 484. (b) Because there was no evidence from which the jury could rationally infer that the failure of the engineer to see the cows in time, if he did so fail, was a negligent failure. *Smith v. H. & St. J. Ry. Co.*, 37 Mo. 287; *Bemis v. Ry. Co.*, 42 Vt. 375; *Price v. Ry. Co.*, 31

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N. J. 238; *Darling v. Ry. Co.*, 121 Mass. 118. (c) Because the law did not require the engineer to stop his train even if he saw the cows, in order to avoid injury to them, and negligence cannot be predicated from the single fact that he failed to check or stop the train. He was only required to use ordinary care to avoid injuring them, by which is meant the use of such means as, in the experience of careful engineers, have been generally found to be sufficient, in preventing contact with them. *Bemis case*, 42 Vt. 375; *Little Rock v. Railroad*, 37 Ark. 593; *Smith v. Railroad*, 34 Ia. 506; *Price v. Railroad*, 31 N. J. L. 238; *Price v. Railroad*, 32 N. J. L. 19; *Bell v. Railroad*, 72 Mo. 50; *Gumz v. Railroad*, 52 Wis. 672; *McCandless v. Ry. Co.*, 45 Wis. 365. (d) There was no evidence that it was in the power of the engineer to stop the train in the distance between the point where he could have first seen the cows, and the crossing. (e) Because there was not a scintilla of evidence authorizing the submission of the question of negligence to the jury. *Darling v. Railroad*, 121 Mass. 118; *McCandless v. Ry. Co.*, 45 Wis. 365. The demurrer should have been sustained, because the plaintiff's own testimony showed that his negligence directly contributed to occasion the injury to his cows. *Grubble v. Sioux City*, 38 Ia. 390; *Lawrence v. Ry. Co.*, 42 Wis. 322; *Bennett v. Ry. Co.*, 19 Wis. 145; *Mich. Southern v. Fisher*, 27 Ind. 96; *Jeffersonville, etc., v. Huber*, 42 Ind. 173; *Jeffersonville, etc., v. Adams*, 43 Ind. 402; *Cinn. Ry. Co. v. Street*, 50 Ind. 225; *Pitzner v. Schinick*, 39 Wis. 129; *B. & M. Co. v. Wendt*, 12 Neb. 80; *Railroad v. Phillipi*, 20 Kas. 9; *Clark v. Railroad*, 11 Barb. 112; *Smith v. Railroad*, 34 Ia. 506; *Curry v. Railroad*, 43 Wis. 684; *Callahan v. Warne*, 40 Mo. 131.

A. H. Vories for respondent.

(1) The defendant was liable if plaintiff's cows

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were on the crossing when the trains came in sight, and the servants of defendant could have seen them, by the exercise of reasonable care and diligence, in time to avoid running on said stock without endangering passengers or trains. The measure of defendant's liability does not depend on the fact whether the employes of defendant actually saw the cows in time to avoid the injury. Plaintiff's second and third instructions were based on the evidence and pleadings, and declared the law properly, except the latter part of the second, added by the court, as to failure to ring the bell or blow the whistle not being negligence. But plaintiff does not complain of that now. *Porter v. H. & St. J. Ry. Co.*, 71 Mo. 78; *Burnham v. St. L., I. M. & S. Ry. Co.*, 56 Mo. 342; *Clardy v. Same*, 73 Mo. 576; *Harlan v. St. L., K. C. & N. Ry. Co.*, 65 Mo. 22; *Pryor v. St. L., K. C. & N. Ry. Co.*, 69 Mo. 215; *Bell v. H. & St. J. Ry. Co.*, 72 Mo. 54. (2) Defendant, from the pleadings in the case, was in no condition to raise any question of contributory negligence of plaintiff. It was necessary, if it relied on such negligence to set it up in the answer. Plaintiff did not aver in his petition anything to release defendant from such plea. *Karle v. K. C., St. J. & C. B. Ry. Co.*, 55 Mo. 482. (3) Plaintiff did not directly contribute to the injury by his own negligence. His testimony shows that he did not have time to drive his cow off the crossing before she was struck by the train; and even if he had time to do so, his failure to do it did not contribute directly, but only remotely, to the injury, and whether plaintiff's negligence was the proximate cause of the injury, was a question for the jury. *Price v. Railroad*, 72 Mo. 419. If plaintiff only remotely contributed to the injury, and the employes of defendant were the direct and immediate cause thereof, and might have prevented it by prudence and care, the defendant was liable. *Burham v. St. L. & I. M. Ry. Co.*, 56 Mo. 338; *Schaabs v. Woodburn Saroen Wheel Co.*, 56 Mo.

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173; *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 384; *Hullsenkamp v. Citizens' Ry. Co.*, 37 Mo. 537; *Liddy v. St. Louis Ry. Co.*, 40 Mo. 506. There was no herding of plaintiff's cattle on the track. The cattle had a right to be on the public road, and the crossing was a public one.

HENRY, C. J.—This action is to recover the value of two cows killed by defendant's train of cars at a public crossing. Plaintiff had judgment, from which defendant has appealed. The petition contains two counts, one for killing a cow on the fourteenth, and the other for killing a cow on the twenty-third of June, 1881. The killing of the cow on the fourteenth occurred about sundown, and the other in the forenoon of the twenty-third, about nine o'clock. Both cows were killed by regular passenger trains.

The evidence for plaintiff tended to prove that the cows could have been seen, by one on the engine, from the whistling post south of the crossing, and at any point between that post and the crossing, a distance of eighty rods. That both trains were going north and running very fast, and in neither instance was the speed of the train checked. Plaintiff also testified that on the fourteenth of June, 1881, he walked into his field and saw the cow standing on the crossing two hundred yards from him. That he started off across his field, and went twenty or thirty rods and came back to the place he started from, and the cow was still standing on the crossing. This was about five or six o'clock. That when he got back to the place he started from he heard the train, which was the regular evening passenger train. He testified, as to the cow killed on the twenty-third, that he was about two hundred yards from the crossing, and saw the cow on it, and a few minutes after saw the train coming north, about one-half mile off, about 9 o'clock, A. M. That he stood and looked at the cow. That his boys were ploughing about half-way between him and the cow. His son testified that he was

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ploughing in the field the day the first cow was killed, and was one hundred yards from her. Saw her standing on the track for nearly a half hour before the train struck her. That he was standing still when the train struck her. That his father's cattle habitually stood on the crossing when they came home at night.

Gharkey, for plaintiff, testified that he was at Milburn's house when the cow was killed on the fourteenth; that plaintiff was at the house just before it occurred. That witness spoke of the cow being on the crossing in plaintiff's hearing. He, plaintiff, then went north into the field from the house, to a point nearly west of the crossing. "It was a good little bit after that till the cow was killed."

Defendant asked an instruction in the nature of a demurrer to the evidence, which was overruled. This is a peculiar case. The plaintiff's cattle habitually stood upon this crossing in the evening. He saw both cows on the crossing before they were killed. When the first one was killed his attention was called to the fact that she was on the crossing a little before the train going north was due. He was then at his house in a south-westerly direction from the crossing, and instead of going toward the crossing, he went north to a point west of the crossing. His own testimony shows that if he had made such an effort as a prudent man, desiring to save the cow, would have made, he could have driven her from the crossing before the train reached it. He made no effort whatever to get her off of the track. From the point where he first saw the cow he walked a distance, in going and returning to it, greater than the distance the cow was from that point, and when he returned she was still on the crossing. This is his own testimony, and he states no emergency to prevent his going to the cow. With respect to the second cow he was two hundred yards from her when he first saw her on the crossing, and a few minutes after he heard the train coming. His boys were midway between him and

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the cow, and he neither made any effort to drive her off, nor ordered his boys to do so, although he and they knew that the train was then nearly due at that point.

Contributory negligence was not pleaded, but when the plaintiff, in making out his case, clearly establishes that the injury he complains of was as much the result of his own negligence as that of the party of whose negligence he complains, can he recover? The ground of his complaint is that the injury was occasioned by the negligence of the defendant, and if his proof shows that his own negligence directly contributes to produce the injury, he disproves the case alleged. *Buesching v. Gas. Co.*, 73 Mo. 229. If the cows were killed intentionally a different question would be presented, but while the petition alleges that they were killed carelessly, recklessly, and wilfully, there is no evidence of a wilful killing, and three members of the court, Sherwood and Black, JJ., and myself, are of the opinion that plaintiff failed to make proof of negligence against the company. For aught that appears the whistle was sounded, and the bell rung on the engine to frighten the cattle from the track. Plaintiff offered no proof that this statutory duty was not performed by the train men. If they failed to make use of those signals of warning, it was negligence, but it was for plaintiff to prove such negligence. It was not a fact peculiarly within the knowledge of the train men. Proof that the speed of the train was not checked, and that the cattle could have been seen eighty rods off, does not establish negligence. It is not shown that they were seen, or, if not, that it was owing to the negligence of the train men. But, be this as it may, and even conceding that there was ample proof of negligence against the defendant, yet it is but negligence against negligence, and where both parties are guilty of negligence contributing directly to produce the injury, there can be no recovery.

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Apart from the mere pecuniary interests involved, did the plaintiff owe no duty to the men, women and children crowded in passenger cars of a railroad train, which was in danger of being wrecked by running over cattle or other obstructions on the road. Is such conduct of a citizen, as that of which plaintiff proved himself guilty on two occasions, to receive the sanction of the courts? How would the case look if the train had been wrecked, and passengers killed or seriously injured, by running over plaintiff's cows, and he had sued for damages? How much less culpable is he who sees an obstruction on a railroad track, which he could easily remove, but will not, knowing that a train is approaching which may be wrecked by running upon it, than he who placed it there. In law the former is not guilty at all, while he who placed the obstruction on the track is a felon; but in the forum of conscience there is but a shade of difference between their guilt. We are not to be understood as holding it to be the duty of owners of cattle either to confine them, or to keep watch over them to prevent them from going upon railroad tracks, but, only, that when they see their cattle in danger on the track, and can, by reasonable exertions, get them off the track, they are bound to do so, and have no right to rely upon the performance of the duty which the law imposes upon the company, to give warning signals. We have held repeatedly that a human being has no right to rely upon the performance of that duty by train men in passing over a public crossing, but must exercise care in doing so, and if himself negligent, cannot recover damages for an injury he may sustain from a passing train.

The instructions as to plaintiff's contributory negligence very fairly submitted that question to the jury, but the error was in submitting it at all. The case should have been withdrawn from them at the close of plaintiff's testimony. The judgment is reversed. All concur, except Norton, J., who dissents.

The State v. Zumbunson.

THE STATE V. ZUMBUNSON, *Appellant*.*

1. **Criminal Law : LARCENY : EVIDENCE.** Defendant and his confederates inveigled the owner of horses into a sale stable, in St. Louis, where another confederate acted in the role of a buyer, and still another as a friend of all parties, in consummating a trade, and while his confederates were endeavoring to trick the owner of the horses into believing that he had traded them for certain mules, which the owner refused to do, the defendant took the horses and went off with them against the will and remonstrance of owner. *Held*, that defendant was properly convicted of grand larceny.
2. **Practice : REMARKS OF COUNSEL : NEW TRIAL.** It is no ground for new trial that counsel in argument to the jury misrepresented the facts in evidence. It is for the jury, in such case, to apply the correction.
3. ——— : ———. Neither language of invective, by counsel, when called forth by the character of the crime, which the evidence tends to disclose, nor urgent appeals to the triers of the facts to do their duty, will justify the Supreme Court in reversing a judgment.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Joseph G. Lodge for appellant.

D. H. McIntyre, Attorney-General, for the state.

NORTON, J.—The defendant was indicted in the criminal court of the city of St. Louis, and was charged in one count of the indictment with grand larceny, and in the other with feloniously receiving stolen property. He was convicted on the first count and acquitted on the second. From the judgment of conviction he appealed to the St. Louis court of appeals, which affirmed the judgment, and he now prosecutes his appeal to this court.

* Decided at the October term, 1883.

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We have not been favored with a brief by defendant's counsel, and are thus left to an inspection of the record for the ascertainment of the grounds relied upon for reversal, the first and most material of which is the refusal of the court to give an instruction after the state had introduced all its evidence, to the effect that the evidence offered failed to make out a *prima facie* case against defendant, and that the jury should acquit. This instruction was properly refused, as the evidence on the part of the state tended to show that defendant, in conjunction with several others, had confederated and conspired together to cheat the prosecuting witness out of two horses which he had taken to St. Louis to sell; that each of the conspirators had their respective parts to play; that defendant assumed the role of an Illinois farmer with a pair of mules for sale, or trade, though the evidence tended to show that he was known in St. Louis by the police as a "capper"; that defendant and his confederates inveigled the prosecuting witness into the sale stable of one Honig, where another confederate acted in the role of a southern mule buyer, and still another as a friend of all parties in consummating a trade with the prosecuting witness for his horses; that while these parties were engaged in trying to trick the prosecutor, whereby it should appear that he had traded his horses for the mules, and while the prosecutor was protesting and refusing to trade, or exchange them for the mules, defendant took the horses and went off with them, against the will and remonstrance of the owner.

The questions of law arising upon this state of facts were fairly put to the jury in the instructions given by the court, in one of which they were told that if they believed, from the evidence, that defendant took and carried away the horses in good faith, believing that he had traded mules for them, they would acquit him.

It is also insisted that the court erred in not granting a new trial, because, in the closing argument, the prose-

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cuting attorney said "that the defendant belonged to the worst gang of horse thieves that ever infested this, or any other city. They are worse than burglars and highway robbers. They have done more to injure St. Louis than any other class of criminals. He belongs to a gang of horse sharks, of whom Dan. Honig is the head. They have about ruined the horse trade here, and make it their business to rob every countryman that comes here. I thank God that the gang is about broken up. You have it in your power to punish them now and vindicate the law. If you do not find defendant guilty, never do you dare complain when you hear of these robberies, committed by this gang, hereafter. If you do not convict him, you say to them all, go on with your thieving and robbing, we give you full license, by our verdict, to do so." While the prosecuting attorney may, and perhaps did, go beyond the line of propriety in the remarks indulged in by him, they contained no misstatement of law, which, if made, the court could and should have corrected, and if the remarks misrepresented the facts or evidence, the jury before whom it was given could apply the correction. It is often the case that counsel disagree as to what the evidence was, and, also, as to the effect of the evidence, and in such cases it is for the jury to settle the controversy and determine the question.

Neither language of invective, if called forth by the character of the crime, which the evidence in a case tends to disclose, nor urgent appeals to the triers of the facts to do their duty, will justify us in reversing a judgment, especially so when the evidence discloses a cunningly devised scheme, as in the case before us, to cheat and steal under the forms of law, and when it is sufficient to support the verdict rendered.

Judgment affirmed, in which all concur.

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CLARK et al. v. CLARK, Appellant.

1. **Bankrupt : DISCHARGE OF SURETY.** C filed his voluntary petition to be adjudged a bankrupt, in May, 1878, and in November following, his wife proved up against his estate a note, which he had executed to her with defendant, as surety thereon, and the wife thereafter assented to the final discharge of the bankrupt. *Held*, that, as the note was executed prior to January 1, 1869, such consent of the wife was unnecessary, and was, therefore, inoperative and did not discharge the surety.
2. **Wife's Chattels : WAIVER OF RIGHT TO BY HUSBAND, AT COMMON LAW.** While, at common law, the chattels of the wife, vested in the husband by virtue of the marriage, yet he could waive his right thereto and permit her to retain them. He could, by his declarations, acts and dealings, release her property from his marital rights.
3. **Husband Borrowing Wife's Money.** Where, instead of asserting his claim, as husband, to his wife's money, he borrows the same, with the agreement and understanding that it is to be repaid or accounted for to her, he will, in equity, be regarded as her debtor.
4. ——— : **SURETY.** Where the husband receives money from the wife and executes to her therefor his note, with another as surety thereon, the transaction of itself shows that the money was not intended as a gift, and creates a valid obligation on the part of the husband to pay the note, which the wife can enforce against both him and the surety.
5. **Code : PLEADING UNDER.** Under the code there is but one form for a civil action, and the petition need only set out the facts constituting the cause of action, and this is the case whether such facts authorize legal or equitable relief.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

J. A. Seddon and H. T. Kent for appellant.

(1) The record, as it appears before this court,

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shows that the motion for new trial was filed in time. Though the bill shows no motion for new trial, the court will examine all "errors of record" in contradistinction to those of "exception." *State v. Marshall*, 36 Mo. 400; *O'Connor v. Koch*, 56 Mo. 253. (2) The record shows that the appeal from the court of appeals to this court was taken in time. *Johnson v. Hodges*, 65 Mo. 590. A motion to dismiss this appeal was made in this court and was denied. (3) The assent of Jane G. Clark was necessary to the discharge in bankruptcy of her husband. 14 U. S. Stat., p. 533, sec. 33, Bankrupt Act, March, 2, 1867; 15 U. S. Stat., p. 227, act July 27, 1868; sec. 5112. Rev. Stat. U. S., 1874, act 1870; sec. —, 18 Stat. U. S., p. 180, act June 22, 1874. Having assented to such discharge, she has discharged also Wm. G. Clark, the surety. Therefore, the court erred in sustaining the demurrer to appellant's answer. This is an error of record, and not of exception. *Broadway Savings Bank v. Bernard Smucker*, 7 Mo. App. 171; *Eggeman v. Henschen*, 56 Mo. 123; *In re McDonald*, 14 B. R. 477; Brandt on Suretyship, sec. 122; *Callaway v. Moff*, 78 Ky. 562. (4) The note sued on is a purely executory contract, as far as the surety is concerned. The consideration of the loan being none other than the property of Robert B. Clark, the principal, the contract is *nudum pactum*, and cannot be enforced against appellant. *Morrison v. Thistle*, 67 Mo. 600; *Sims v. Ricket*, 35 Ind. 188; *Terry v. Wilson*, 63 Mo. 499; Adams' Equity, marg. p. 97 (p. 224 of 5th Am. Ed.); Story's Equity Juris., sec. 793 (p. 864 of 11th Ed.); Story's Equity Juris., sec. 1375; *Loyd v. Fulton*, 91 U. S. 485; *Halloway v. Headington*, 8 Sim. 324; *Edwards v. Jones*, 1 Myln. & Cr. 227; *Hallfield v. Wilson*, 54 Ala. 276; *Woodford v. Stephens*, 51 Mo. 448; *Walker v. Walker*, 25 Mo. 367. (5) The petition is so clearly defective that no judgment can be rendered on it. For any judgment which could be rendered in pursuance of it would enure to the benefit of

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Robert B. Clark, the principal, who cannot be allowed to realize a judgment against his surety. *Walker v. Walker*, 25 Mo. 367. The judgment is entered in favor of both plaintiffs, where, at best, it could only be entered in favor of Jane G. Clark, for her own separate use. A judgment in favor of a principal against the surety is an absurdity. Though the error may be corrected, the appellant should have his costs of appeal, *Bergen v. Cave*, 52 Mo. 43.

A. R. Taylor and C. A. Davis for respondents.

(1) Under this state of facts, the note became the separate property of Jane G. Clark, it never having been reduced to possession by her husband, and always having been by him recognized as the separate estate of the wife. The defendant gave his obligation to pay the note, and the covenant was his several contract to pay. Although an obligation of the principal may be void, that is no defence to the surety. *Meed Co. v. Maxwell*, 63 Mo. 486; *Lobaugh v. Thompson*, 74 Mo. 600; Parsons on Bills, 244-246; *Morrison v. Thistle*, 67 Mo. 600. (2) No step taken by a creditor for the discharge of a bankrupt can affect liability of surety. *In re Levy*, 2 Benedict, 169; *Guild v. Butler*, 5 Rep. 15; Brandt on Suretyship, p. 505, note 3. Again, as the note was made prior to January 1, 1869, the assent of Jane G. Clark to the discharge of Robert B. Clark was unnecessary and nugatory. *In re Sheldon*, 12 National Bankrupt Register, 63; *In re Perkins*, 1 Cent. L. J. 507; *In re Frank*, 6 Chicago Legal News, 414; *In re Wheeler*, 16 National Bankrupt Register, 277.

RAY, J.—The plaintiff, Robert B. Clark, is the husband of co-plaintiff, Jane G. Clark, and is joined with her herein by virtue of the statute, and only for the purpose of the suit. Jane G. Clark and her said hus-

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band filed the amended petition in this action June 10, 1878, in the circuit court of the city of St. Louis, on a promissory note made by said Robert B. Clark as principal, and said Wm. G. Clark, defendant, as security, for the sum of \$2,000, dated December 22, 1866, and payable to said Jane G. Clark, one year after date, with eight per cent. interest per annum. The amended petition, in addition to the ordinary averments in suits upon promissory notes, avers the payment of certain and divers sums, credited on said note at the dates given, the last being within the ten years next preceding the date of instituting this suit. It also avers that the note sued on is the separate property of said Jane Clark.

The amended answer of defendant admits the execution of the note as such security, but denies that the note was of the separate estate of the wife, or that the consideration proceeded from her. It sets up that the credits thereon were not made in good faith, but for the mere purpose of preventing the bar of the statute of limitations; it pleads a release of defendant therefrom by the plaintiff in the years 1874 and 1875, and, also, payments thereof; it also sets up that since the execution of the note it became vested in said Robert B. Clark, the principal, and became thereby satisfied and discharged, and it further sets up the statute of limitations, and, also, the consent of the wife to her husband's discharge in bankruptcy, whereby his liability as security was discharged.

The plaintiffs successfully interposed a special demurrer to this last mentioned special plea of the husband's discharge in bankruptcy and the wife's consent thereto, and replied generally to the rest of said new matter set up in the answer.

The issues thus remaining were tried and determined by the court, sitting as a jury. Mrs. Jane Clark was the only witness for the plaintiff. Her evidence showed that the money loaned and for which said note was given

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by her husband and his brother, Wm. Clark, came to her by inheritance; that she retained possession thereof and exclusive possession, also, of the note, with the consent of her husband, and that the payments thereon were made and received in good faith, at the various dates given. Her evidence was uncontradicted, and she was, in fact, the only witness in the case who testified in this behalf. The defendant was the only witness in his behalf, and his evidence merely went to show that he signed the note in the capacity of a surety; that he never received any part of the money; that his brother, Robert, made an assignment to him for his creditors, and that the last endorsement of credit on said note was thirteen days prior to said assignment. This was all the evidence in the case.

The court gave but one declaration of law, which was for the plaintiff, and was as follows:

“The court declares the law to be that if Jane G. Clark, the plaintiff, on and prior to December 22, 1866, was the owner of two thousand dollars in money which she had received by inheritance, and that on said day she loaned said sum of money to Robert B. Clark, the co-plaintiff herein, and that in consideration of said loan said Robert B. Clark, as principal, and defendant Wm. G. Clark, as surety, executed the note mentioned in the amended petition and filed therewith, and delivered the same to Jane G. Clark on the date aforesaid, and if the said Jane G. Clark has, ever since said note was so delivered to her, kept said note in her possession, with the consent of said Robert B. Clark, up to the time that suit was brought, and if the said Robert Clark never had possession of said note, and if there was paid on said note in suit Jane G. Clark by either Robert B. Clark, the principal, or Wm. G. Clark, the security, the following sums, at the following dates, to-wit: December 22, 1866, the sum of \$80; December 12, by \$80;

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and February 20, the sum of \$200; and if said payments were made and received by said Jane G. Clark in good faith as payments on said note, and if no other and further payment has been made on said note, and if said Jane G. Clark has kept the said note in her possession exclusive from her said husband, Robert B. Clark, from the time she received it to the present time, and has all the time been the owner of said note, and if she has never released the said note, then the plaintiff is entitled to recover in this action the amount mentioned in said note, to-wit: \$2,000, with interest at the rate of eight per cent. per annum, to this date, less payments and interest."

Two declarations of law were asked by the appellant, and refused by the court, but it is unnecessary to set them out. The first was in the nature of a demurrer to the evidence. The second was upon the question of good faith in making the endorsements of credit on the note, and was expressly covered by the one already given. The issues were found for the plaintiff, and judgment was given accordingly. On appeal therefrom the same was affirmed in the court of appeals, and the case is now before us on appeal from said court.

The controlling questions of law which the record presents, are: first, as to the action of the court in sustaining the demurrer to said special plea set up by the answer. The substantial facts alleged in said plea and admitted by the demurrer are, that in May, 1878, Robert B. Clark, the principal on the note, was on his own petition adjudged a bankrupt, and in November, 1878, said Jane Clark, his wife, proved up said note as a demand against said bankrupt, and thereafter assented to his final discharge as such bankrupt, which consent of said wife thereto, the appellant claims operated as a discharge of the security. The other view of this question, presented by plaintiffs, is that, as the debt, evidenced by

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said note, was made prior to January 1, 1869, such assent of Mrs. Clark was not necessary to her husband's discharge, under the provisions of the bankrupt law, and that said consent thereto was, therefore, a nullity, and inoperative. This involves a consideration of several provisions of the bankrupt laws.

The second clause of section thirty-three of the bankrupt act of March 2, 1867, which went into effect June 1, 1867, is as follows: "And in all proceedings in bankruptcy, commenced after one year from the time this act should go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims, is filed in the case at or before the time of application for discharge."

The act of 1870 (sec. 5112, R. S., 1874), is as follows: "In all proceedings in bankruptcy, commenced after the first of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per cent. of the claims proved against the debtor, unless the assent in writing of a majority, in number and value, of his creditors, to whom he shall have become liable as principal debtor, and who shall have proved up their claims, is filed in the case at or before the hearing of the application, but this provision shall not apply to those debts, from which the bankrupt seeks a discharge, which were contracted prior to the first of January, 1869."

The last act on the subject, and of date June 22, 1874, is as follows:

"That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors as a condition of his discharge from his debts, shall not apply; but he

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may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value, and the provisions in section thirty-three, of said act of March 2, 1867, requiring fifty per centum of such assets, is hereby repealed."

Other acts of congress are omitted as having no special or important bearing on the question now under consideration. The appellant contends that the act of June, 1874, repeals the act of 1870, and made it necessary for a voluntary bankrupt to either pay thirty per cent. of his indebtedness, or to obtain the assent in writing of one-fourth in number, or one-third in value, of all his creditors, without regard to the date of said claims, whether prior or subsequent to January 1, 1869, before a final discharge could be granted him. We are unable to concur in this view. In said act of 1870, the assent of those creditors only whose debts are subsequent to January 1, 1869, is required, and creditors whose claims are prior to January 1, 1869, are not thereby required to assent to such discharge. The changes introduced and effected by said act of 1874, are manifestly still further in the interest of the debtor, mainly, perhaps entirely, in increasing his facilities for obtaining his discharge. The first clause of said act, in cases of involuntary and compulsory bankruptcy, broadly wipes out all requirements of payments of any portion of the debts of the bankrupt, or the assent of any portion of his creditors as a condition of his discharge. The second clause of said act, while not treating cases of voluntary bankruptcy with such unlimited liberality, is manifestly designed and intended

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and enacted in their interest. It reduces the per centum of claims to be paid, from fifty to thirty per centum, and diminishes the assent of creditors from a majority in number to a fourth in number, or a third in value. With this spirit and obvious direction in said act, it was not, we think, and could not have been, intended that a class of debts, such as originated prior to January 1, 1869, and which had been expressly excluded by the act of 1870, were intended to be again brought within the requirements of the bankrupt laws as to the assent of creditors. Further, the only repeal expressly enacted in said act relates exclusively to said provision in said section thirty-three, of said act of March 2, 1867, requiring said fifty per centum of assets. Said act of 1874 does not, we think, expressly, or by necessary implication, repeal the provisions of said act of 1870 (sec. 112, R. S.), excluding the payment of fifty per cent. of claims, or the assent of a majority in number, or value, of creditors as a condition of discharge, where the debts were contracted prior to January 1, 1869, and it is not, we think, in any respect, in conflict or inconsistent with said provision of said act. The whole question is fully and elaborately considered and determined in *In re Sheldon*, 12 Nat. Bank Reg. 63, and in *In re Wheeler*, 16 Nat. Bank Reg. 277, and the views held by us and conclusion reached in this behalf are fully supported by said authorities.

It is further urged upon us in appellant's behalf, that the consideration of the loan was simply the property of said Robert B. Clark, the principal in the note, and that the contract is, therefore, without consideration and cannot be enforced against the security. By the common law, which was in force at the date of this transaction, money or chattels owned by the wife at the time of marriage, or such as she might thereafter acquire by inheritance, or otherwise, became the property of the husband by virtue of the marital relation. But the hus-

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band may waive his right as such, and permit her to retain her money and property, and he may, by his declarations, acts, and dealings, in regard thereto, free and relieve her property from his marital claims. Where, instead of asserting his claims as husband, to his wife's goods and money, he borrows the same with the agreement and understanding, clearly shown in some of the modes known to the law, that the same is to be repaid, and that he is to become liable therefor, then he will be regarded and held, in equity, at least, as her debtor. Schouler on Husband and Wife, sec. 395; 1 Cord's Legal and Equitable Rights of Married Women, sec. 85 and subsequent; 2 Story's Eq. Juris. (12 Ed.) sec. 1380; 25 Mo. 367, and 374, 375; 46 Mo. 82; 26 Conn. 226; 4 Metcalfe (Ky.) 84; 10 Ohio, 371; *Hammond v. Renfrow*, 84 Mo. 332; *Bettes v. Magoon*, 85 Mo. 580; *Morrison v. Thistle*, 67 Mo. 597, 600, and authorities there cited.

Contracts of this character made between husband and wife are held to be void as to injured and complaining creditors, but the defendant does not stand in that relation to the principal and meritorious plaintiff in this action and has not the rights of such. As to others they are not nullities. Such a transaction as we are now considering may and does create valid demands against the husband, or his estate, in favor of the wife, which the courts will enable her to enforce by an appropriate and sufficient remedy. There is nothing in the record showing that the husband, Robert B. Clark, ever asserted any claims, as husband or otherwise, to the money inherited by the wife. On the contrary, the evidence shows he allowed her to keep and retain the exclusive possession thereof. Nor is this a case where there is a mere forbearance on the husband's part to assert his rights as such. She parts with the possession of said money, not upon the faith of his individual note alone, but upon said note executed by him, and executed further by his brother as security thereon. If the husband

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was claiming, or asserting his right to it, as such, why execute and deliver to his wife his promissory note? If it was thereby intended as a gift and not as an indebtedness to the wife, why was his brother required to sign as security upon said note? And further, defendant, Wm. Clark, well knew the marital relation existing between said Jane Clark and his brother, Robert Clark, the principal in said note, and it is not material, we think, whether, under the facts and circumstances of this case, the undertaking of defendant is to be regarded, as to the wife, as that of a principal obligor, or as merely accessory to the principal obligation of his brother in said note. There was, as we have said, a valid obligation on the part of the husband, growing out of this transaction, covered by said note, which she could enforce against him, and this is a good and sufficient consideration for the obligation of the defendant to pay the same at maturity. The fact that she may be compelled to resort to the jurisdiction of a court of equity to enforce her said demand against her husband is, we think, immaterial.

We have, under our system, but one form of civil action and her petition to enforce said claim would be required to set out the facts whether the same were such as would entitle her to legal or equitable relief. An infirmity extending to the mode or remedy for enforcing her demand against her husband does not extend to or impair the right itself. The anomaly, complained of by appellant, that this record presents a case where the principal debtor in said note recovers a judgment against his surety thereon, is, we think, more apparent than real. The wife is the only payee in said note. She is the only substantial and meritorious cause of action. The presence of her husband in the action is merely in compliance with the statute requiring him to be joined. He is a mere nominal party and is to be regarded and

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treated as such, both in said action and in said judgment recovered therein. See cases cited, *supra*.

Finding no error in the rulings and action of the trial court, its said judgment is, therefore, affirmed. All concur.

THE FIRST NATIONAL BANK OF HANNIBAL V. THE NORTH
MISSOURI COAL AND MINING COMPANY, *Plaintiff*
in Error.

1. **Settlement, IMPEACHMENT OF: NOTE.** Where a settlement of accounts has taken place between parties and a note payable to a third person is given in satisfaction of the amount found to be due in an action on such note by the indorsee, the maker, without bringing all the parties interested into court, cannot impeach such settlement, nor show that the note was without consideration.
2. **Corporation, Note of: ACTS OF AGENTS.** The authority of a corporation or its officers to issue its promissory note need not be expressly given by its by-laws, or by formal resolution of the board of directors. Such authority can be inferred from the acquiescence of the corporation in, or the recognition by it of, the acts of its accredited officers in the regular course of its authorized business

Error to Hannibal Court of Common Pleas.—HON
J. T. REDD, Judge.

AFFIRMED.

James Carr for plaintiff in error.

(1) The defendant corporation had no authority to issue the notes sued on. Such act on its part was *ultra vires*. Laws of Mo. 1863-4, 20; *McCullough v. Moss*, 5 Den. 569. (2) Only the directors of the defendant could make the notes, if they could be made at all.

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Godfrey stood in a fiduciary relation to each company and this totally disqualified him from acting for either. He could not deal with himself. *Gamble v. Gibson*, 59 Mo. 585; *Flint & Pere Marquette Ry. Co. v. Dewey*, 14 Mich. 477; *People v. Township Board*, 11 *Id.* 222; *Aberdeen Ry. Co. v. Blaikie*, 1 McQueen, 461; *Wilbur v. Lind & Hough*, 49 Cal. 290; *San Diego v. S. D. & L. A. R. R. Co.*, 44 *Id.* 106. For the same reason he could not settle his account with the North Missouri Coal and Mining Company for money loaned, advanced or laid out and expended for it. Price, as secretary, had no authority to settle with Godfrey. Godfrey could not perform the two-fold and inconsistent character of creditor and debtor. (3) There was no consideration for the notes; the defendant was not indebted to the Central Coal and Mining Company. (4) The facts sought to be proved by the witness, Hayward, were competent as evidence, and the court erred in excluding the same. (5) All the equities between the original parties are open and subject to be inquired into. *Goodman v. Simonds*, 19 Mo. 106; *Caddington v. Bay*, 21 John. 637; *Craighead v. Wells*, 8 Baxt. 38. (6) The bank took the notes with notice that they were given without consideration, and the court erred in refusing to permit defendant to show that the bank or its president had such notice. *Munroe v. Cooper*, 5 Pick. 412; Daniel on Neg. Ins., sec. 813. (7) When it is shown by the defendant that the note originated in *fraud*, then the burden of proof is shifted to the plaintiff to show that he came by the note in due course of business and paid value for it without notice. *Smith v. Sac. Co.*, 10 Wall. ; *Munroe v. Cooper*, 5 Pick. 412.

C. A. Winslow for defendant in error.

(1) The court committed no error in giving or refusing instructions. (2) Instruction number five did not

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contain the law. A by-law or resolution of the board was not necessary to show authority to make the notes. The acts and acquiescence of defendant's officers was competent to show the authority and its proper exercise. *Preston v. Missouri & P. L. Co.*, 51 Mo. 43; *Turner v. Chillicothe, etc., Ry. Co.*, 51 Mo. 501; *Washington M. F. I. Co. v. St. Mary's Sem.*, 52 Mo. 480; *Kiley v. Forsee*, 57 Mo. 390; *Southgate v. A. & P. R. Co.*, 61 Mo. 89; *Southern Hotel Co. v. Newman*, 30 Mo. 118; *Kitchen v. Ry. Co.*, 59 Mo. 514. (3.) The three defences are, want of power to make accommodation paper, want of consideration and payment; and it is alleged that plaintiff took with notice and without value. The first instruction asked by defendant and given by the court, and all the other instructions asked by it, except the fifth, expressly concede that the notes were properly issued, and that, by an agreement with Cartlidge, they could be taken by the Central Company in payment of Godfrey's debt, and be by Cartlidge indorsed to plaintiff as collateral for the debt of that company. The fifth instruction enunciates the proposition, that authority to make the notes could only be proven by the statute, the articles of association, the by-laws, or a resolution of the board. The point now made is an apparent afterthought, and has no standing in this court. The defendant must stand on the record as made below. The judgment cannot be reversed on a theory not tried below; much less, on a theory not set up in the answer, or contained in the instructions asked and refused, even if there are facts seeming to justify it, which is not this case. *Stix v. Matthews*, 75 Mo. 96; *Clements v. Yates*, 69 Mo. 623. On the case, as made by the pleadings and evidence, the court committed no error in excluding the testimony offered to be given by the witness, Hayward. It would be an anomalous proceeding to permit a readjustment and settlement of the affairs of defendant in this suit, without other parties and a more suitable foun-

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dation in the pleadings. The settlements must be set aside, the accounts readjusted, and a new one taken, before defendant can reach the relief sought. This statement of the question ought to be conclusive. All the parties interested are necessary parties in equity, and the code preserves this rule. The charge is that the books and settlements are false. *Burke v. Flurnoy*, 4 Mo., *loc. cit.*, 117; *State ex rel. v. Sanderson*, 54 Mo. 203; *Alexander v. Homer*, 1 McCrary, *loc. cit.*, 42-3; Bliss Code Plead., secs. 72, 96, 97; Sto. Eq. Pl. (9 Ed.) secs. 136, 138.

RAY, J.—This was an action on four promissory notes, commenced in the Hannibal court of common pleas, April 18, 1874. Each of said notes was dated July 28, 1873, due sixty days after date with interest from date at ten per cent., payable to the Central Coal and Mining Company or order, executed by the North Missouri Coal and Mining Company, by C. O. Godfrey, president, and Edward Price, secretary, and endorsed before maturity to plaintiff by the Central Coal and Mining Company, one for \$9,000, one for \$2,963 and two for \$10,000 each. There was no defence to the count on the first note, and the controversy arises over the last three. It appears that the North Missouri Coal and Mining Company and the Central Coal and Mining Company were Missouri corporations, organized under an act of the legislature, entitled "an act relating to incorporations for manufacturing and other purposes," approved February 15, 1864, for the purpose of digging and mining for coal in certain counties in the state and buying and selling the same, as the directors of said companies should deem best calculated to promote the interest of the stockholders thereof, etc. Sess. Acts of Mo. 1863, p. 18.

It also appears that the directors of said North Missouri Coal and Mining Company, by its articles of association, had power to make and prescribe such by-laws,

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rules and regulations, respecting the management, control and disposition of the stock and property of said company as they might deem expedient and proper, not inconsistent with the constitution of the United States or of this state; and that the by-laws of said corporation, so made, contain no express authority empowering its officers to make accommodation or any other kinds of paper. Section fifty-seven, of the by-laws of said North Missouri Coal and Mining Company, is as follows:

"Sec. 57. All transfers and conveyances of real estate shall be made by the company and under the seal thereof, in accordance with the orders of the board, and shall be signed by the president and secretary. All coal lands bought by individual members of the company on the line of the North Missouri railroad, or its branches, shall be bought for the benefit of the association, and shall be deeded to the association at the original cost and expense of purchase; and no advance shall be claimed by the party purchasing, or paid by the association for time and trouble; and all leases taken on the line of the said North Missouri railroad, or any of its branches, shall be for the benefit of this company."

Section ten of the act of the legislature, *supra*, provides that: "The corporations created and established by this act shall not, at any time, be engaged in banking, or suffered to do a banking business, or suffered to deal in bills of exchange, or notes, or make or utter the same, except when the same are given or received, *bona fide*, in the transaction of business connected with the object of their creation."

It further appears that Cyrus O. Godfrey was, at and before the date of said notes sued on, a stockholder and director in, and president of, both of said corporations; that Price was secretary of defendant company, and Cartledge treasurer of the Central Coal & Mining

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Company. It also appears that Hunt was both president of the First National Bank of Hannibal, and a stockholder in the North Missouri Coal & Mining Company, and that Godfrey was likewise a director in said national bank.

The answer of the defendant contains six several counts, in which the matters of defence are variously stated, but they need not be here set out in full. The defence is, in substance, that the notes were made for the accommodation of Godfrey, without any consideration, as between the two companies, and without power in the defendant company to make such paper, or authority in its officers to issue it; that Godfrey procured them to be issued by fraud and undue influence for his own accommodation; that the defendant company did not owe the Central Company anything, and the notes were without consideration; that Godfrey made it appear, by procuring false entries in the books of defendant, that defendant was indebted to him more than the amount of said notes for which he caused them to be executed, as stated, and indorsed to plaintiff for his own benefit, when, in fact, he was indebted to defendant in large sums on account of certain frauds and breaches of duty specified in the answer; that, for the several reasons stated, the notes were not the notes of defendant, and were obtained by fraud and without consideration; that they had been paid by another note; and that defendant took them without value and with notice of the matters charged. These matters are set up in the six several counts of the answer and are denied by the reply, which also sets up that plaintiff took the notes for value, in good faith, and without notice of the matters alleged against them.

At the trial before the jury there was evidence tending to show that the defendant owed Godfrey, at the date of these notes, more than the amount thereof; that Godfrey owed the Central Coal & Mining Company more than the amount of the notes; that the notes were exe-

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cuted and delivered to Godfrey in payment of so much of the indebtedness to him, and his account credited therewith; that they were accepted by the Central Company in payment of Godfrey's indebtedness to it; and that this adjustment of the accounts was made by an agreement with Cartledge as treasurer of the Central Company. There was evidence further tending to show that the Central Company became indebted to plaintiff in the sum of over \$30,000 on account of protested drafts drawn on Godfrey and negotiated by plaintiff; that the notes in suit were indorsed to plaintiff, before maturity, as collateral security for said indebtedness and that said indebtedness still remains unpaid. There is other evidence tending to prove that subsequently, by an arrangement between the parties, certain other notes of Godfrey were substituted for the liability of the Central Company on the protested drafts; that about the same time Godfrey made a note to plaintiff for \$50,000, and secured it by a deed of trust on real estate, which was intended to protect his general indebtedness to plaintiff, including the notes last described; that the notes in suit were still held as collateral for the indebtedness of the Central Company to plaintiff, then evidenced by the notes referred to in that connection, and that the deed of trust was foreclosed and the proceeds applied to the indebtedness secured, the *pro rata* of the Central Company being credited on the notes aforesaid, which, after deducting the proceeds of other collaterals credited thereon, still left more than the amounts of the notes sued on, due plaintiff by the Central Company. Such other portions of the testimony as we deem material will be noticed in the progress of this opinion. It is well, also, to state here that during the progress of the trial the defendant asked certain questions and offered to prove certain facts, which, on motion of plaintiff, were excluded by the court and excepted to by defendant, which also will be considered hereafter.

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At the conclusion of the testimony, the court, of its own motion, gave the following comprehensive instruction:

"1. If the jury find, from the evidence, that at the date of the notes sued on, the defendant was indebted to Cyrus O. Godfrey in a sum equal to, or exceeding, the aggregate sum of said notes, and that, at said date, said Godfrey was indebted to the Central Coal & Mining Company in a sum in excess of the aggregate of said notes; and if the jury further find that it was understood that the said notes were executed and made payable to the said Central Coal & Mining Company with the understanding that said notes, if accepted by said Central Coal & Mining Company, should operate to satisfy defendant's debt to Godfrey, and so much of his, Godfrey's, debts to the Central Coal & Mining Company, and if the jury further find that said notes were delivered to and accepted by said Central Coal & Mining Company under said agreement, and that said Godfrey was thereupon credited with the amount by the said Central Coal & Mining Company, and defendant credited by said amounts in its account with said Godfrey; and if the jury shall further find after said notes were so delivered to the Central Coal & Mining Company, said company drew its drafts on said Godfrey, payable in New York, one for \$30,000 and the other for \$969.52, and procured said drafts to be negotiated by plaintiff and received the proceeds thereof; and if the jury shall further find that said drafts were presented to said Godfrey for payment, and protested for non-payment, and that, after due notice to said Central Coal & Mining Company of said protest, said company delivered the notes in suit to plaintiff as collateral security for the payment of the debt specified in said drafts, with the understanding that plaintiff would give to said company and said Godfrey a reasonable further time to pay said drafts, such state of facts vested the title to said notes in plaintiff and the verdict should be for

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plaintiff. Unless the jury find, from the evidence, that the witness Cartledge was, at the date of the notes sued on, treasurer of the Central Coal & Mining Company, and that said Cartledge did, on the behalf of the said Central Coal & Mining Company, agree with said Godfrey to accept, and did, in fact, accept the notes sued on, in part discharge of the debt of said Godfrey to said company; and unless the jury further find that said notes were by Godfrey accepted in satisfaction of defendant's debt to Godfrey, the notes sued on are without consideration and the verdict should be for defendant, provided the plaintiff had notice of said facts at the time said notes were delivered to plaintiff." To which the defendant excepted.

The court also gave for the defendant the following instructions:

"1. If the jury believe from the evidence that C. O. Godfrey was president of the Central Coal & Mining Company, and was also president of the North Missouri Coal and Mining Company, and that, at the time of the execution of the notes in controversy by said Godfrey, as president, and Edward Price, as secretary of said North Missouri Coal and Mining Company, to the Central Coal & Mining Company, the said North Missouri Coal & Mining Company, was not indebted to the said Central Coal & Mining Company, the notes sued on are without consideration; unless the jury shall further find that at said time the North Missouri Coal & Mining Company was indebted to said Godfrey in the amount of said notes, and, by a mutual understanding and agreement between said companies, that said notes were to be so executed in payment of said indebtedness to said Godfrey, and accepted by said coal and mining company in payment of said Godfrey's indebtedness to it."

"6. If the jury find from the evidence that at the time the notes were indorsed to plaintiff, Josiah Hunt was president of the bank and Cyrus O. Godfrey was one

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of the directors, the bank, in contemplation of law, had notice of any state of facts connected with the giving of said notes, of which said Hunt or said Godfrey then had notice or personal knowledge."

"9. Unless the jury find from the evidence that the witness, Cartledge, was, at the date of the notes sued on, treasurer of the Central Coal & Mining Company, and that said Cartledge did, on behalf of the said Central Coal & Mining Company, agreed with said Godfrey to accept, and did, in fact, accept the notes sued on in part discharge of the debt of said Godfrey to said company, and unless the jury further find that said notes were by Godfrey accepted in satisfaction of defendant's debt to Godfrey, the notes sued on are without consideration and the verdict should be for defendant; provided the plaintiff had notice of said facts at the time said notes were delivered to plaintiff."

Among the instructions asked by defendant and refused by the court is the following:

"5. C. O. Godfrey, as president, and Ed. Price, as secretary, of defendant, had no authority, either from the statute under which the defendant was organized; under the articles of association of defendant; under its by-laws, or under any resolution of its board of directors, to make and deliver the notes in controversy. And authority to make and deliver said notes must be given in one of those modes." To the refusal of which the defendant excepted.

Upon the issues thus made and submitted the jury found a verdict for the plaintiff and there was judgment accordingly, from which the defendant, after an unsuccessful motion for a new trial and in arrest, brings the case here by writ of error. On this state of the record it is apparent that the only questions remaining for review grow out of the action of the trial court in excluding evidence and in giving and refusing instructions. The evidence, thus excluded, is indicated by certain questions

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propounded to witness, Hayward, touching the kind of terms Godfrey and Hunt were on, at the date of the transactions; and whether said witness had any conversations with Hunt, as president of said plaintiff bank, in regard to Godfrey's management of defendant company, at any time prior to the twentieth of August, 1873; or in regard to Hunt's being notified that Godfrey was using the moneys and credit of defendant company for his own use; or whether witness gave Hunt any such information, or whether witness knew anything in regard thereto; or whether Godfrey had so used or appropriated such funds and credit prior to the execution of the notes in question. These questions were not permitted to be answered, on the ground, as to some of them, that the information sought to be elicited was irrelevant, immaterial and incompetent; as to others, that they were also hearsay, and on the further ground that Godfrey was not a party to this suit.

The defendant offered to prove by said witness the following facts: "(1) That C. O. Godfrey, whilst acting as director and president of the defendant, and without any authority from defendant, or from its board of directors, between the first day of January, 1871, and the twenty-eighth of July, 1873, wrongfully took money, funds and assets belonging to defendant to a large amount to-wit: The sum of \$34,395.44 and upwards, and used, appropriated and converted the same to his own use and benefit. (2) That said Godfrey was, at the time of the pretended making and delivery of said notes, and still is, insolvent. (3) That said Godfrey, whilst acting in his capacity as president of the defendant, and without any authority from the defendant, or from its board of directors, between the first of January, 1871, and the time of the making and delivery of said notes, wrongfully took money, funds and assets of defendant and misapplied and misappropriated said money, funds and assets as follows: By investing the sum of \$25,995.44

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in the capital stock of the Camden Coal Company, a corporation organized under the laws of the state of Missouri for the purpose of mining coal at Camden, in Ray county, Missouri, and taking the title to said stock in his own name; and, also, by investing the sum of \$3,400 in the purchase of the southwest quarter of the southeast quarter and the southeast quarter of the southwest quarter of section twenty, in township fifty-six, and range fourteen, west, situated in Macon county, Missouri, and opening and developing and equipping what is called and known as the 'Emerson Mine,' or mine number seven, on said real estate and the improvements placed thereon, with the defendant's money, in his own name." But this offer was not allowed by the court, on the ground that the same was irrelevant and incompetent.

From an examination of the interrogatories propounded to witness, Hayward, and the subsequent offer to prove certain facts by him, it is quite apparent that they cover substantially the same thing; in other words the facts offered to be proved constitute, for the most part, the evidence sought to be elicited by the question previously asked the same witness, and for that reason they may be examined and considered together. The answer to one is a reply to the other. It is contended for defendant that the facts proposed to be proved tended, at least, to prove one of the main and material issues on trial; that is, that the notes sued upon were without consideration; or, in other words, that the defendant company, in point of fact, as would have appeared upon a fair settlement and adjustment of accounts, was not indebted to Godfrey in any amount whatever, and that plaintiff had notice thereof when it took said notes. If we concede, for the sake of the argument, the correctness of these propositions, does it follow, under the undisputed facts in evidence and the state of the pleadings in the cause, that such evidence would have been competent or admissible on the trial of the issues thus made and

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presented? What are the conceded facts? It appears that the books and settlements of the defendant company, kept and made in the regular course of its business, by its entries, accounts and balances, show that at the date of these notes there was a balance due said Godfrey from said defendant in excess of said notes and that said notes were given and accepted in settlement and payment of said balance to the extent thereof. This is apparent, both from the answer of defendant and the uncontradicted testimony of the witness, Price, who was its accredited cashier and book-keeper, and, as such, familiar with said books and their contents. The purpose of these interrogatories, or facts offered to be proved, was, in effect, to set aside these settlements and re-open and readjust said accounts and balances. Can this be done in the absence of the parties interested therein and affected thereby? Neither Godfrey nor the Central Coal & Mining Company are parties to this suit. It may be conceded that, upon a proper showing in the answer in the nature of a cross-bill, this might, under proper circumstances, be done, but in such a proceeding it is manifest that all the parties interested therein and affected thereby would be necessary parties to such an inquiry.

The settlements and adjustments of the accounts, as shown by the books, existed as facts, and were made with apparent authority in the regular course of its business. They were the basis of the notes in controversy, in the validity of which both Godfrey and the Central Coal & Mining Company are interested. Any attack upon them for fraud, mistake or abuse of authority would involve all of the parties to be affected by such attack and render them necessary parties to the suit. In the absence, therefore, of these parties we are not prepared to say that the court erred in excluding such evidence. *Burk v. Flournoy et al.*, 4 Mo. 117; *State ex rel. v. Sanderson*, 54 Mo. 203, 206; *Alexander v. Horner*, 1 McCrary, 634;

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Bliss on Code Plead., secs. 72, 96, 97; Story's Eq. Plead. (9 Ed.) secs. 136, 138.

It is insisted for defendant that the court erred in refusing the fifth instruction asked on its behalf. This instruction calls in question both the power of the corporation itself and the authority of the officers named to make or issue the notes in question. It asserts without qualification that the officers named "had no authority, either from the statutes under which the defendant was organized, under the articles of association of defendant, under its by-laws, or under any resolution of its board of directors, to make and deliver the notes in controversy, and that the authority to make and deliver said notes must be given in one of these modes." Under prior adjudications of this court on kindred questions and the admitted evidence in this cause, we are not prepared to say that it was error to refuse this instruction. According to the authorities, the power and authority of such corporations, or its authorized officers, to make such papers, need not in all cases be expressly given in its by-laws, or by formal resolution of its board of directors. It may be sufficient, in many cases, if it can be fairly inferred or presumed from its acquiescence in, and recognition of, the acts of its accredited officers, in the regular course of its authorized business, for a series of years, as in the case at bar. In this case it appears, as before stated, that the North Missouri Coal & Mining Company (as well as the Central Coal & Mining Company), was a Missouri corporation, organized under the act of February 15, 1864, for the purpose of digging and mining coal in certain counties in the state, and buying and selling the same as its directors should deem best calculated to promote the interest of its stockholders.

The tenth section of said act provides that: "The corporations, created and established by this act, shall not at any time be engaged in banking, or suffered to do a banking business, or suffered to deal in bills of exchange,

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or notes, or make or utter the same, except when the same are given or received *bona fide* in the transaction of business connected with the object of their creation."

It is apparent from this section of the act that the object of the legislature was to prohibit such corporations from engaging in banking, or doing a banking business, or dealing in, uttering or making bills of exchange, or notes, as such banks, and it is equally plain, we think, that it was not the purpose thereby to prevent such corporations from making or issuing promissory notes when given or received *bona fide* in the transaction of business, connected, as these were, with the object of its creation. Indeed, such is the express language of the act itself. The testimony of Price, the accredited secretary of the defendant, if he is to be believed, and he stands unimpeached by the record, shows in direct and express terms that the notes in controversy were thus given and received; that they were given and received in payment of so much due from the defendant to Godfrey, on account of advances made by said Godfrey, in payment of the debts and expenses of said company in its said mining operations, and in the usual course of its expressly authorized business. There is no evidence in the record showing that said notes were made, as charged in the answer, for the accommodation of Godfrey, or without consideration. But all the evidence tends to show that they were given in the transaction of business strictly connected with the object of the creation of the corporation.

There was evidence tending to show that such paper was habitually used by such officers, in the ordinary transactions of the defendant, for a series of years, without any express authority in its by-laws, or any formal resolution of its board. Under the statutes in question, the organization of the corporation thereunder, the evidence in the cause, and the adjudications in question, the defendant company has, we think, no just cause to complain

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of the refusal of said instruction. 5 Mo. *supra*; 51 Mo. 43, 45; 51 Mo. 501; 52 Mo. 480; 57 Mo. 390; 61 Mo. 89; 30 Mo. 118; 59 Mo. 514; 45 Mo. 419; 74 Mo. 104; 7 Cranch. 299; *Donnell et al. v. Lewis Co. Sav. Bk.*, 80 Mo. 165; *Ringling v. Kohn*, 6 Mo App. 333.

It is, also, objected that the court erred in the instruction given, on its own motion, in others given on behalf of plaintiff, and in the refusal of other instructions asked by the defendant. The instructions given cover, we think, all the material and issuable facts in the case, and, as we think, properly and fairly submitted them to the jury and, as often declared, it is not our custom to disturb the verdicts so found. The other instructions refused were deemed either not material or substantially embraced in those actually given in the cause. Other questions and authorities are suggested and cited in the briefs of counsel, but we deem them not necessary to the proper disposition of the cause, and they need not be further noticed.

Finding no error in the record the judgment of the trial court is affirmed. All concur.

HOPKINS *et al.*, Appellants, v. SCOTT.

1. **Tax Deed : STATUTE.** Where the statute prescribes a form for a tax deed, such form becomes a matter of substance and must be strictly followed.
2. ——— : ———. Where the statute provides that the tax deed shall be substantially in the form prescribed such form must be substantially, although not literally, complied with.
3. ——— : **OMISSION OF RECITALS PRESCRIBED BY STATUTE.** While it is not necessary, in the latter case, to make the recitals in the words employed in the prescribed form, yet it is necessary, that

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the recitals required in such form be substantially made, and if not so made, such omission is fatal to the deed.

4. — : —. The omission in a tax deed of the words, "for the payment of taxes, interest and costs then due and unpaid on said real property," is fatal to such deed, the statute having prescribed a form containing such recital and requiring that the deed should substantially comply with the form.
5. **Statute of Limitations: VOID TAX DEED.** A tax deed omitting such recital is void on its face, and the special three years' statute of limitations does not run in favor of the person holding possession under such deed.

Appeal from Jackson Circuit Court.—HON. T. A. GILL, Judge.

REVERSED.

Karnes & Ess, James F. Mister and R. H. Field
for appellants.

(1) The failure to recite in the deed that the property was exposed to sale by the collector, "for the payment of taxes, interest and costs due and unpaid upon said real property," is absolutely fatal to the efficacy of the deed, because it is only in such cases that the city collector had any authority whatever for selling the property at all. (2) The tax deed, authorized by the charter of the City of Kansas, must have in it the entire substance of the form therein prescribed, and the omission of any recital of fact, which recital is contained in that form, is fatal to the tax deed, and if there is any presumption it is that the law was not complied with. *Lain v. Cook*, 15 Wisconsin, 446; *Wakely v. Mohr*, 18 *Ibid.*, 321; *Kroegen v. Knab*, 22 *Ibid.*, 429; *Hubbard v. Johnson*, 9 Kansas, 632; *Grierson v. O'Connell*, 54 California, 522; *Hubbell v. Campbell*, 56 *Ibid.*, 529; *McDermott v. Tully*, 27 Arkansas, 226; *Jacoway v. Gault*, 20 *Ibid.*, 19; *Atkinson v. Kinnon*, 20 Wendell (N. Y.) 249; *Merritt et al. v. Parchester*,

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71 N. Y. 309; *Keith v. Preston*, 5 Grattan (Va.) 120; *French v. Patterson*, 61 Maine, 203; *Lovejoy v. Lunt*, 48 Maine, 378; *Chandler v. Spear*, 22 Vermont, 388; *Long v. Burnett*, 13 Iowa, 29; *Yankee v. Thompson*, 51 Missouri, 234, 238; *Little v. Herndon*, 10 Wallace (U. S.) 26; *French v. Edwards*, 13 *Ibid*, 506. (3) The city collector has no general authority to expose to public sale real property. He has only the naked power conferred by the statute (amended charter of the City of Kansas, affirmed March 24, 1875). There can be no supplying of the omission to recite by presumption that he followed the power given in making the sale. *Hogan v. Brashears*, 13 Arkansas, 242; *McDermott v. Scully*, 27 *Ibid*, 226; *Hubbard v. Johnson*, 9 Kansas, 634; *Long v. Burnett*, 13 Iowa, 28; *French v. Patterson*, 61 Maine, 210; *Woodward v. Sloan*, 27 Ohio, 592; *Yankee v. Thompson*, 51 Missouri, 237; *Cooley on Taxation*, 209, 324; *Blackwell on Tax Title*, 46. (4) The omission of recitals in a tax deed, such as the law requires, render it void, and such defect cannot be aided by evidence *aliunde*. *McDermott v. Scully*, 27 Arkansas, 227; *Pack v. Crawford et al.*, 29 *Ibid*, 489; *Bonnett v. Roan*, 20 *Ibid*, 114; *Hogan v. Brashears*, 13 *Ibid*, 242; *Wakeley v. Mohr*, 18 Wisconsin, 321; *Walker v. Moore*, 2 Dillon (C. C. R.) 256; *Cooley on Taxation*, 242. (5) Such a deed, being void upon its face, does not put into operation any statute of limitations. *Burroughs on Taxation*, sec. 121, p. 340; *Geike v. Kirby, Carpenter & Co.*, U. S. Circuit Court "Reporter" (1879) p. 37; *Moore v. Brown*, 11 How. (U. S.) 414; *Little v. Herndon*, 10 (Wall. U. S.) 26; *Cogal v. Ralph*, 24 Minnesota, 198; *Sheely v. Hinds*, 27 *Ibid*, 259; *McGarnock v. Pollock*, 13 Nebraska, 535; *Sutton v. Stone*, 4 *Ibid*, 319; *Kilpatrick v. Sismeross*, 23 Texas, 114.

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Hough, Overall & Judson and C. A. Kenyon for respondent.

(1) The deed under which defendant claims is valid on its face. The statute was substantially complied with, and this is all that is required. *Hubbard v. Johnson*, 9 Kan. 632; *Williams v. McLanahan*, 67 Mo. 499; *Bank v. Musereau*, 3 Barb. Ch. 577. (2) Even if the tax deed is void upon its face, the special statute of limitations should be held to apply, the defendant, and those under whom he claims, having been in possession for the time limited. *Waterson v. Deavor*, 18 Kan. 223; *Thomas v. Stickle*, 32 Ia. 71; *Douglass v. Tillock*, 34 Ia. 262.

NORTON, J.—This is an ejectment suit to recover possession of a certain lot in the City of Kansas, described in the petition, and on the trial of the cause defendant obtained judgment, from which plaintiffs have appealed. It is conceded that the title to the lot in question is in the plaintiffs, and that they are entitled to recover, unless their title has been divested by a certain tax deed, put in evidence, through which defendant claims, or unless their right of action was barred by limitation. It is contended by plaintiffs' counsel that the tax deed, under which defendant claims title, is void upon its face. The circuit court held it to be valid, and this ruling of the court is one of the grounds of error assigned.

The first question, therefore, presented for determination is whether or not said deed is void on its face. And this question is to be determined by an application of the statute authorizing its execution to the deed, to ascertain whether it conforms to the statutory requirements. Before proceeding to make such application it may be observed that it seems to be settled, when a statute pre-

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scribes the form of the tax deed, that such form becomes substance and must be strictly followed. Blackwell on Tax Title, 406; *Williams v. McLanahan*, 67 Mo. 500; *Grimm v. O'Connell*, 54 Cal. 522. As a corollary, deducible from this principle, it may be said that when the statute provides that the tax deed shall be substantially in the form prescribed, though such form need not be literally, it must be substantially, followed. While it is not necessary, in such cases, to make the recitals in the words employed in the prescribed form, it is necessary that the recitals, required in such form, be substantially made and, if not so made, such omission is fatal to the deed. *Lain v. Cook*, 15 Wis. 446; *Wakely v. Mohr*, 18 Wis. 321; *Krueger v. Knab*, 22 Wis. 429; *Hubbará v. Johnson*, 9 Kan. 632. It is provided by section 64 of the charter of the City of Kansas (Laws 1875, p. 237), that "tax deeds executed by the city collector shall be substantially in the following form." The statute then gives the form of the deed, and, among other recitals required to be made therein, is the following: "That the city collector did expose to public sale the real property described [*for the payment of taxes, interest and costs then due and unpaid upon said real property.*"] The tax deed relied upon by defendant contained every other recital in the form prescribed by the statute, except the one above italicized and included in the brackets, which is not only entirely omitted from the deed, but it contains no other recital equivalent to or substantially like it.

It is true that other required recitals are made in the deed in the exact language used in the form prescribed, from which an inference can be drawn that the collector did expose to public sale the property for the payment of taxes, interest and costs thereon due and unpaid; but this does not comply with the requirement of the law, which is that the recitals shall be substantially and affirmatively made, and not that one fact, required

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to be affirmatively and substantially made, may be inferred from other facts recited in the deed, which the statute also requires to be substantially and affirmatively made. The argument made by counsel in support of the validity of the deed is, that, although the recital of a fact required by the law to be substantially made is not so made, but entirely omitted from the deed, such omission is immaterial, provided you can, from other recitals of facts contained in the deed, which the statute also requires to be made, reasonably infer that the fact contained in the omitted recital took place or occurred. We think this argument unsound. The mandate of the law is that the recitals in the tax deed shall be substantially as set forth in the statutory form. The conclusion of the argument is that you may omit entirely from the deed one required recital, provided, from the other required recitals which are made in the deed, you can infer the omitted recital.

Section 64, *supra*, of the charter requires the following to be substantially stated by the collector in a tax deed, viz: "That the following described real property, situated in the City of Kansas, in the county of Jackson and state of Missouri, was subject to taxation for the year or years A. D., 18—, and whereas the taxes assessed upon said real property * * * remained due and unpaid at the date of the sale hereinafter mentioned." Suppose the collector in making his deed, after describing the property and stating that it was subject to taxation for a specified year or years, and that the taxes thereon for such year or years remained due and unpaid at the date of the sale, omitting the word assessed; could it be reasonably claimed that such omission would be immaterial? We think not, although in such case it might be as plausibly argued, as it is in the omission of the words in the case before us, that such omission is not material, inasmuch as, from the recital

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that the property was subject to taxation and that the taxes thereon remained due and unpaid, the omitted fact that the taxes had been assessed might be inferred, as taxes on property subject to taxation could not remain due and unpaid without such taxes had been first assessed. So, in this case, it is recited in the deed in question "that the taxes remained due and unpaid at the date of the sale hereinafter mentioned," and "that at the place aforesaid, W. E. Sheffield having offered to pay the sum of \$965.15, being the amount of taxes, interest and costs then due and remaining unpaid on said real property, which was, in each case, the smallest portion bid for, and payment of said sum having been made to the city collector the said property was stricken off to him."

The above recitals are in the form prescribed by the statute and it is argued that it can be plainly inferred from them that another required recital, viz: that the collector did expose the property to public sale "for the payment of taxes, interest and costs remaining due and unpaid," was made. We concede that this inference can be drawn, but it does not, therefore, follow that when the legislature has required a fact to be substantially affirmed, which is not thus affirmed, that, from other facts, which it, also, requires to be substantially affirmed, and which are affirmed, and which neither perform the same office as the omitted fact, nor necessarily include it, we can infer the omitted fact and substitute, by inference, what the law-making power has said must be affirmed. The office of the recital that the collector exposed the lots in question to sale "for the payment of taxes, interest and costs then due and unpaid," was to show that he exposed it to sale for the only purpose for which, under the law, he could sell it. The office of the other recitals was to show that it was in fact sold for the very purpose for which it had been offered for sale, and that the proceeds of the sale were applied to that pur-

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pose. It may be said, that, to hold the deed in question to be void on its face, because of its failure to state, substantially, a fact required to be thus stated, would be technical. The answer to this is, that the legislature has required a certain fact to be substantially stated, which, in this case, has not been done, and we are not authorized to eliminate from the statute a recital which the legislature has declared the deed must substantially contain, nor are we authorized to say that this or that recital, required to be stated substantially in a tax deed, is unnecessary and immaterial, but must, on the contrary, presume that the legislature deemed all the recitals, which it required to be set out, material.

Besides this, when it is considered that the omitted words in this deed expressed the purpose for which the estate was to be sold, and that the city collector had no power to sell it for any other purpose, the recital was necessary in order to show on the face of the deed his authority to sell. When it is further considered that the sale in question was not a judicial sale, but one made without notice, and that the tax deed, when made and recorded, had an importance and effect attached to it not given to a deed to a purchaser of real estate at a judicial sale, made under the sanction and authority of a court, in this, that from the time of recording the tax deed it starts to running a three years' statute of limitations against the original owner of property. If he does not sue to recover (although the tax purchaser may not be in the actual possession of it) within three years from the time of filing the deed, he is forever barred of his right of action. When these facts are considered, in connection with the further fact that the tax deed is made conclusive evidence of some things and *prima facie* evidence of other things, it is not going too far to say that the legislature intended every recital, required to be substantially made, to be a necessary and material

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one. We must, therefore, hold that, inasmuch as a material recital in the form prescribed is not only entirely omitted from the deed in question, being neither stated in form nor substance, that it is, for that reason, void upon its face.

For further illustration of the principle that a tax deed must show an affirmative compliance with statutory requirements, in addition to the cases hereinbefore cited, the following are referred to: *Yankee v. Thompson et al.*, 51 Mo. 234; *Lagroue et al. v. Rains et al.*, 48 Mo. 536; *Large v. Fisher*, 49 Mo. 307; *Abbott v. Doling*, 49 Mo. 302. In the case last cited, in speaking of a sale authorized to be made by a collector without any judgment, it is said: "A collector's sale is essentially *ex parte*. The officer does not act under the supervision of a court; he acts at his own peril and by his own advice; and must perform every pre-requisite required by the statute before the title of the citizen can be passed away from him. The deed of the collector must show affirmatively that the law has been complied with in all particulars."

It is further insisted by counsel that, even though the tax deed may be void on its face, the possession of defendant thereunder puts in operation the three years' statute of limitations, and that, as defendant had been in possession of the lot in question for more than three years before this suit was brought, the action of plaintiff was barred. This precise point has been passed upon at the present term of this court, and expressly ruled against the position taken, in the case of *Mason et al. v. Crowder*, 85 Mo. 526, where it is held that the special statute of limitations of three years has no application except where the tax deed is valid on its face.

The judgment reversed and cause remanded. All the judges concur, except Judge Henry, who dissents.

Givens v. Van Studdiford.

GIVENS v. VAN STUDDIFORD, *Appellant*.

1. **Bill of Exceptions : MOTION FOR NEW TRIAL.** A bill of exceptions is properly made up at the term of the court at which the motion for a new trial is overruled. And it is immaterial that such motion was overruled at the third term after it was filed without being continued from term to term by any special or general order of court.
2. **Public Nuisance : BAWDY HOUSE.** A bawdy house is a public or common nuisance *per se*, but this is not the case when such house is authorized by law and kept in accordance with its provisions.
3. ——— : ———. Where, in violation of the municipal ordinance regulating such house, the inmates so indecently expose or conduct themselves as to render the property of an adjoining proprietor undesirable or unfit for use and occupancy by decent persons, it becomes a common nuisance.
4. **Leasing Property for Bawdy House : INJURY TO ADJOINING OWNER.** To render the landlord responsible in such case to the adjoining owner for the depreciation in value of the latter's property resulting from such alleged nuisance, it must appear that he leased the property for the purpose of or knowing it would be used for a bawdy house and that he assented to the indecent conduct of the inmates, or continued the leasing after knowledge of the fact.
5. **Public Nuisance, Private Action for.** While, as a general rule, it is true that the law does not give a private action for a public wrong, an exception to this exists where a private person suffers some damage over and beyond the rest of the community by reason of a public nuisance.
6. ——— : SPECIAL DAMAGE. In a private action for injury resulting from a public nuisance, the special damage suffered by the plaintiff must be averred and proved.
7. **Measure of Damages.** The loss of rents is a proper element of damages in an action against the lessor of a bawdy house by the owner of adjoining property for injury resulting to the latter from the nuisance.
8. ———. The depreciation in the value of the property, it having been sold at a forced sale during the continuance of the nuisance, is also a proper element of damages.

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9. **City Ordinance, When Must be Plead.** Where one asserts his right to recover upon a city ordinance, or seeks to justify an act done by him under such ordinance, he should plead it.

Appeal from St. Louis Court of Appeals.

REVERSED.

James O. Broadhead, H. A. Haeussler and C. C. Simmons for appellant.

(1) The petition in this case does not set up or contain facts sufficient to constitute a cause of action. This is a private action for a public nuisance, and there is no allegation or averment that the plaintiff had ever sustained any injury therefrom that was not common to the public at large, or which was not participated in by the public as well as himself. It is an inflexible rule of law, that no single individual can maintain a suit, either in law or equity, to enjoin or abate a public and common nuisance, or to recover damages for himself occasioned thereby, unless he alleges and avers, and can prove that his injury is special and peculiar to himself, beyond, and of a different kind, and distinct from that which is sustained by the whole neighborhood or his fellow citizens generally. Such injury must be direct and positive as well as particular and not consequential, speculative or conjectural. *Butler v. Kent*, 19 Johns. 223; *Venard v. Cross*, 8 Kansas, 248; *Lansing v. Smith*, 8 Cowen, 146, 157; *Dougherty v. Bunting*, 1 Sanford, Sup. Ct. Rep. 1; *Wetmore v. Story*, 3 Abbott's Pr. Rep. 288, 289; *Adams v. Popham*, 76 N. Y. Appeal Rep. 410, 413; *Baxter v. Winsoski Turnpike Co.*, 22 Vt. 114; *Hamilton v. Whiteridge et al.*, 11 Md. 128; *City of Baltimore v. Marriott*, 9 Md. 160; 19 Pick. 149; *Manhattan Gas Light Co. v. Barker*, 36 Howard Pr. Rep. 233; Wood on Nuisances, sec. 829, p. 878. (2) The effect of the provision in section 1, article 3, of the

amended charter of the city of St. Louis, approved March 4, 1870 (Sess. Laws, 1870, 463-4), authorizing the city to suppress and regulate bawdy houses, was to repeal and entirely eliminate from the criminal code all the statutory and common law provisions in force, previous to that time, imposing penalties for keeping such houses, or renting them for such purposes, and so the Supreme Court expressly declared in the cases of *The State v. Kate Clark*, 54 Mo. 17, 23, 30; and *State v. Vic. De Bar*, 58 Mo. 395. English Draft Code, 1879, sec. 10; 2 Wharton's Criminal Law, sec. 1410 (8 Ed.); Wood on Nuisances, p. 2, note; *Ib.* p. 787, sec. 750; 17 N. J. Eq. Rep. 75; 32 Michigan 419-420; *Leigh v. Westersfelt*, 2 Duer, N. Y. Sup. Ct. Rep. 618; *Williams v. Railroad*, 18 Barb. 247; Gibbons on Nuisances, 396; *Phoenix, etc., v. Com. of Em.*, 12 Howard Pr. Rep. 1-14; *Harris v. Thompson*, 9 Barb. 350; *Knox v. Mayor of N. Y. City*, 55 Barb. 404; Wood on Nuisances, sec. 757, p. 798; *Randle v. Pacific Railroad Co.*, 65 Mo. 325; *Transportation Co. v. Chicago*, 9 Otto, 635, 640; *The People v. Law*, 34 Barb. 514. (3) A landlord is not liable for a nuisance if at the time of the letting there is no actual nuisance on the premises. Gibbon on Nuisances, 407; *Owings v. Jones*, 9 Md. 108; Wood on Nuisances 116. (4) Where the defendant is not the original creator of the nuisance, he must have notice of it and a request must be made to remove it before an action can be brought. *Grigsby v. Clear Water Lake Co.*, 40 Cal. 396; *Pierson v. Glenn*, 2 N. J. Rep. (Green) 36; *Johnston v. Lewis*, 13 Conn. 303; *Noyes v. Stillman*, 24 Conn. 15; *Pillsbury v. Moore*, 44 Maine, 154, 156; *Carlton v. Reddington*, 21 N. J. 291; 1 Chitty on Pl. 94, note *m.* (5) The court erred in admitting the plaintiff's testimony to show that he might possibly have rented his premises had it not been for the improper conduct of the occupants of the defendant's house. The evidence was

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merely speculative and conjectural. The testimony of the other witnesses as to the general character and reputation of the house and its inmates was also objectionable. If the house was a nuisance *per se*, there is nothing to show that plaintiff suffered differently from others. If the house was a legalized nuisance, as we contend, then its reputation and that of its inmates in these respects, was only the natural and necessary consequence of the peculiar business, which, at the time, the law tolerated. (6) The court erred in excluding the testimony offered by the defendant as follows: The ordinance of the city of St. Louis, number 7330, entitled "An Ordinance to regulate Houses of Ill Fame," approved July 9, 1870. In the cases of the *State against Kate Clark and Vic De Bar*, above cited, the Supreme Court held that this ordinance was a valid one, and that a permit or license under it exempted the party holding it from any prosecution by the state for keeping such a house as is here complained of. Special matter as a license need not be pleaded specially. *Wood on Nuisances*, sec. 839; 1 *Chitty Pl.* 491; *Bird v. Randall*, 3 *Burr.* 1353.

Thoroughman, Christian & Priest for respondent.

(1) This court has no jurisdiction and cannot consider the appellant's appeal, as the same was not taken in the time required by law. The motion for new trial was filed November 28, 1881, but was not passed upon until the first day of May, 1882. As this court will take judicial notice of the time for holding the courts, it is clear that the bill of exceptions was not filed during the term at which the judgment was rendered; nor does the record show any agreement by the attorneys that they might be filed out of time. *Ellis v. Anderson*. 25 Mo. 327; *West v. Fowler*, 55 Mo. 300; s. c., 59 Mo. 40; *State v. Ducknott*, 68 Mo. 156; *Riddlesbarger v. McDaniel*,

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38 Mo. 139. (2) The petition sufficiently states a cause of action. *Marrott v. Baltimore*, 9 Md. 160; *Smith v. Boston*, 7 Cush. 254. (3) The evidence that the keeper of the bawdy house was licensed as such by an ordinance of the city was properly excluded. This evidence could not have been admitted, even if defendant had pleaded it as a special defence, and surely it was not admissible when it was not pleaded. *Nelson v. Brodhack*, 44 Mo. 596; *Smith v. Calligan*, 71 Mo. 387; *Atterberry v. Powell*, 29 Mo. 429; *Adams v. Trigg*, 37 Mo. 141; Pomeroy on Remedies, sec. 673. (4) Judicial notice will not be taken of a municipal ordinance. *Cox v. St. Louis City*, 11 Mo. 431; *Mooney v. Kennett*, 19 Mo. 210; *State ex rel. v. Oddle*, 42 Mo. 210. (5) The manner in which the business of the house was conducted rendered it a common nuisance, irrespective of the question as to the right of the keeper of the house to keep it as a bawdy one. *Cleveland v. Citizens Gas Light Co.*, 20 N. J. Eq. 201; Wharton's C. L., sec. 1424. (6) Where a landlord lets a house knowing that it will be used for the purposes of prostitution, he will be liable to those suffering injury from the nuisance. Wood on Nuisances, p. 36, sec. 30.

BLACK, J.—Some of the questions presented by this record were considered by the court of appeals on the first appeal. 4 Mo. App. 498. The opinion then filed was approved by this court. 72 Mo. 129. Questions not then considered are also now presented in argument and in elaborate briefs.

1. It is first insisted that there is no bill of exceptions of which the court can take notice for the purpose of disposing of the case on its merits. The cause was tried at one term of the circuit court, when a motion for a new trial was filed in due time. The motion stood over for two terms, was called up and overruled at the third term after it was filed, and the bill of exceptions was

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then allowed in which the exceptions taken on the trial were for the first time saved. The motion does not appear to have been continued from term to term, or from any of these terms to the next, by any general or special order. In *Riddlesburger v. McDaniel*, 38 Mo. 138, it was said by Wagner, J.: "And until a final hearing and disposition of the motion (for new trial) the whole matter would unquestionably rest in the breast of the court, and it would be competent for it, in its discretion, for good cause, to sustain the motion and award a new trial. Until this result is reached, it cannot be said that the cause is finally determined. And as the statute requires all exceptions to be embraced in the same bill it would be correct if filed at the term when the matter is disposed of."

The statute to which reference was there made is the same as section 3636, Revised Statutes, 1879. It is argued that this section of the practice act was only designed to avoid filing so many bills during the progress of the same trial, and was not intended to carry the exceptions over until the motion for new trial was acted upon. The *Riddlesburger case* asserted the doctrine that the exceptions taken on the trial of a cause might be preserved in the bill filed when the motion for new trial was overruled, though at a subsequent term of the court. That ruling was followed in *Gray v. Parker*, 38 Mo. 160, and recently in *Henze v. Ry. Co.*, 71 Mo. 644, and must now be regarded as the settled practice in this state. The ground upon which the rule must stand is that these matters of exception taken on the trial are in the breast of the court until the motion for new trial is determined. Either party had the right to and could have called up the motion at the term at which it was filed, or at any subsequent term, if he desired determination of the same. The bill of exceptions must, therefore, be considered as a part of the record.

2. The facts pleaded and undisputed are that

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plaintiff owned a lot in St. Louis upon which there was and is a valuable building. He incumbered the property by a deed of trust for \$20,000 in 1873 and the property was sold under this deed of trust in December, 1875. Defendant owned an adjoining lot upon which there was also a house. Plaintiff, in his amended petition, alleged that defendant leased his property to tenants for a house of prostitution and that it was so used with the knowledge of defendant; that the inmates indecently exposed themselves at the windows next to plaintiff's property, by reason of which plaintiff's property became undesirable and depreciated in value, so that he thereby lost rents, and the property did not sell for as much as it otherwise would have sold for.

The evidence shows that the plaintiff leased his property for a period of five years at an annual rental of \$3,250, the lease expiring in December, 1872; that from February, 1873, the house was vacant for a year, when it was rented for a time and again became vacant. There was evidence to the effect that the loss of rent was due to the fact that defendant's house, during all this time, was used as a house of ill fame and because of the indecent exposure of the inmates as alleged, and that for like reasons the property was depreciated in value and that the defendant knew, as far back as 1872, the purposes for which his house was used, and that plaintiff had complained to him because of such use. The defendant offered evidence tending to show that the property in the neighborhood had ceased to be desirable residence property and was not good business property; that being in this condition the houses in the vicinity filled up, to a considerable extent, with this class of occupants, and that the depreciation of rents was due from this and other causes. It is clearly shown that defendant's house was, prior to 1870, and on to the sale of plaintiff's property leased to Kate Clark; that in 1870 she was registered as a keeper of a house of ill fame at this place by the city

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authorities under what is called the social evil law. That ordinance, which was approved July 9, 1870, was offered in evidence by the defendant, but excluded by the court.

A bawdy house or house of ill fame is a public or common nuisance, *per se*. Hawkins P. C. 362; *Clementine v. The State*, 14 Mo. 112. That this is so, in the absence of any statutory provision or regulation, is clear enough. To conduct such a place, or lease property for such a purpose, is a public wrong. How far this proposition of law is to be regarded as modified by reason of certain local legislation is a matter of more difficulty. In *The State v. Kate Clark*, 54 Mo. 17, the defendant was indicted under the statute for keeping a bawdy house. She pleaded a license from the officials of the city of St. Louis, given to her by virtue of an ordinance passed by authority of the charter of 1870, which charter gave the mayor and council power to "regulate or suppress bawdy houses." It was there held that the license was a complete defence. In *The State v. Vic De Bar*, 58 Mo. 396, it was held that the act of March 30, 1874, which amended the charter of 1870 so as to deprive the city of the power to regulate such vices, did not revive the general law but still left it inoperative in the city of St. Louis. When the city legislature exercised the power to regulate such vices the ordinance had the effect, at least, to suspend the operation of the general law, so far as inconsistent with the ordinance. It must follow that the matter of regulating, instead of suppressing these houses, became and was the law in St. Louis so long as the ordinance in question was in force. Whether the law was well or ill advised is a matter with which we have no concern. The ordinance should have been admitted in evidence, for there was some evidence to the effect that this house was kept in compliance with its provisions.

It is difficult to see how we can hold such a place to

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be a public nuisance *per se*, so long as it has the protecting hand of the law, and so long as kept within the regulations prescribed by the ordinance. There is nothing in the ordinance to justify such conduct, however, as is charged in the petition and supported by evidence in the cause. A trade, occupation or business, though lawful in itself, may and often does, from the time, place or manner in which it is conducted, become a nuisance. The same is true of those things unlawful in themselves but for statute law. The placing of a railroad in a public highway may be allowed by law, yet if so constructed or used as to unreasonably and unnecessarily obstruct public travel, it becomes a public nuisance. In view of this municipal legislation, the instructions cannot be sustained. They proceed upon the theory that such a place is a nuisance without further proof; that one who leases property for, or who knew that the premises were used for such purposes, is liable for special damages. They must go farther and leave it as a question of fact for the jury to determine, whether the inmates so indecently exposed or conducted themselves as to render the plaintiff's property undesirable or unfit for use and occupancy by decent persons. If they did this, there is no reason why the place should not be pronounced a nuisance, notwithstanding it may have been registered and the keeper licensed under these local laws.

To hold the landlord liable for damages, it must not only appear that he leased the property for the purpose of or knowing that it would be used for a bawdy house, but it must be found as a fact, under appropriate instructions, that he assented to such indecent conduct of the inmates, or continued the leasing after knowledge that the house was so used. In short, the facts must be found which will make the place a nuisance notwithstanding the ordinance, and defendant's assent to such use, or that he continued the lease knowing the prop-

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erty was thus indecently used. We are not informed by the record, certainly not by the abstracts, whether the lease to this woman was from month to month, by the year, or for a period of years.

3. The question urged at length by counsel for defendant, *i. e.*, that the petition does not show any cause for a private action, is, we conclude, not well taken. Generally, it is true, for a public wrong the law gives no private action, but a well established exception is, that where a private person suffers some damage over and beyond the rest of the community by a public nuisance he shall have a private action for such damage. 3 Black. Com. 220; *Barden v. Crocker*, 10 Pick. 388; *Stetson v. Faxon*, 19 Pick. 147. Beyond doubt, the special damage must be averred and proved. *Smith v. McConathy*, 11 Mo. 517. It is true, the petition does not in so many words allege that the injury suffered by the plaintiff was other and different in kind from that suffered by the community in general, but it does, as we have seen, in detail show that he was deprived of the full use and enjoyment of the rents of his property. A slaughter house may be a common nuisance and alike uncomfortably affect all who come within the locality, but to those who live or own property in the immediate vicinity and are disturbed in the use or enjoyment of their property an action will lie. It is no objection that others similarly situated may also have a private action. Wood on Nuisances, 736, 737. Nor is it any objection that all those who contribute to the injury are not made defendants. *Woodyear v. Schaefer*, 57 Md. 1. The petition, in so far as it discloses special damages, is in conformity with well established precedents. 2 Chitty Plead. 789. It is well enough, whether the nuisance be public or private. The motion to strike out parts of the petition was properly overruled. It attempted to eliminate from the petition some of its most essential elements.

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4. As to the measure of damages the rule seems to be well settled that if the nuisance be such as may be removed or abated, or for the continuance of which other actions may be brought, loss of rents is a proper element and permanent damages are not allowed. *Pinney v. Berry*, 61 Mo. 359. But where the "injury inflicted is of a permanent character and goes to the entire value of the estate the whole injury is suffered at once, and a recovery should be had therefor in a single suit, and no subsequent action can be maintained for the continuance of such injury." *Van Hoozier v. Ry. Co.*, 70 Mo. 145; *Dickson v. Ry. Co.*, 71 Mo. 579. The general rule is the loss actually sustained up to the commencement of the suit. The loss of rents occasioned by reasons of the nuisance complained of is, therefore, a proper matter to be considered in estimating the damages. In view of the forced sale of this property during the continuance of the nuisance, if any there was, we see no reason why the plaintiff may not recover also for the actual depreciation in the value of the property at the date of the sale. The damages must be limited to such as were produced by the nuisance complained of. Damages occasioned by other houses of a like character must be excluded. The instructions can be made clear in this respect. The fact that such damages are not susceptible of mathematical certainty is no objection to their allowance. They seldom, in this class of cases, assume that form.

5. Where a party asserts and founds a right to recover upon a city ordinance, he should plead the ordinance, and where a party seeks to justify an act by him done under an ordinance, it would seem he should also plead the ordinance. *Mooney v. Kennett*, 19 Mo. 552; *State ex rel. v. Oddle*, 42 Mo. 210; *Culligan v. Studebaker*, 67 Mo. 372. But we do not see that these principles apply to this case. The plaintiff does not found his right to recover upon any ordinance. Nor does it

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appear that the defendant was required to procure a license or permit to rent his house. The broad question is presented, was this house so kept as to be a nuisance, notwithstanding the ordinance?

The judgment is reversed and cause remanded. All concur.

[No. 1753.]

CRISPEN V. HANNOVAN *et al.*, *Appellants*.

[No. 1465.]

CRISPEN, *Appellant*, v. HANNOVAN *et al.*

1. **Ejectment.** Where a plaintiff comes into possession of the premises after the commencement of his action of ejectment, and during its pendency, he is, nevertheless, entitled to a judgment for *mesne* profits, and for his costs.
2. **Judgment, Reversal of.** Where a judgment is reversed with the usual mandate to restore the parties to the same condition in which they were before its rendition, it becomes mere waste paper, and the parties are allowed to proceed in the trial court to obtain a final determination of their rights in the same manner and to the same extent as if the cause had not been decided in the trial court. Neither party in the subsequent prosecution of the cause can suffer detriment or receive assistance from the former adjudication.
3. **Practice in Supreme Court: JUDGMENT AGAINST A MARRIED WOMAN.** Where a judgment is erroneously rendered against a married woman, the Supreme Court can amend the same by striking out her name.

Appeal from Carroll Circuit Court.—HON. JAMES M. DAVIS, Judge.

AFFIRMED as to number 1753.

REVERSED as to number 1465.

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Prosser Ray, John L. Mirick and Hale & Sons for Hannovan et al., appellants in cause number 1753.

(1) The defendants acquired title to the eleven acres either under the ten years' or the two years' limitation law. If their adverse possession began after the date of the judgment, in 1875, it being military bounty land, the defendants acquired title under the two years' limitation law. If it is held to commence with the possession of their ancestor, say in 1867, then they have acquired title under the ten years' limitation law. (2) The judgment rendered in 1875, being in favor of plaintiff for all the quarter in controversy, except the eleven acres on the west side, and that being the judgment appealed from by defendants, and no appeal taken by plaintiff, no land was in controversy on the trial in this cause, except that portion of the quarter involved in the judgment appealed from by the defendants, and which was reversed by the Supreme Court. (3) The instructions given for the plaintiff, and refused for the defendants, show clearly that the case was tried and determined by the court below on the theory that the whole quarter was in controversy on that trial, and yet the judgment is only for a part of the eleven acres on the west side of the quarter. The finding and judgment of the court, therefore, is contrary to the instructions given and refused, and does not accord therewith. If that part of the quarter, except the eleven acres on the west side, was not in issue, and plaintiff was not entitled to recover the same, then the court erred in giving the first instruction on that point. (4) The first duty of the court below after the reversal of the former judgment was to carry into effect the mandate of this court before any other proceedings in the ejectment suit. (5) The lower court rendered a judgment at law against Mary McKinney, a married woman, and it is clearly irregular as to her. *Hunt v. Thompson*, 61 Mo.

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148. (6) The judgment for damages against the administrators could be recovered only in a separate action.

Botsford & Williams, L. H. Waters, and T. J. Whiteman, for Crispen, respondent in cause number 1753.

(1) The action of ejectment can be maintained in all cases where the plaintiff at its commencement is legally entitled to the possession of the premises against the defendant then in possession, and the fact that during the pendency of the action the possession has passed from defendant to plaintiff, and that at the time of the trial plaintiff is in possession of the premises sued for, or a part of the same, will not bar a recovery. R. S., secs. 2247, 2253, 2256-7; Adams on Ejectment (Ed. 1840) 390; *Clarkson v. Stanchfield*, 57 Mo. 573. (2) Damages for waste and injury to the freehold, by way of damages, mesne profits during the occupancy of the adverse holder are also awarded in this action, and a judgment in such case is a bar to any other action for such damages, rents, and profits. *Stewart v. Dent*, 24 Mo. 111; *Lee v. Bowman*, 55 Mo. 400. In this state, an action of trespass, without ejectment, cannot be maintained for mesne profits or damages for waste by a party out of possession holding the legal right of possession against one in the actual possession of lands without an actual disseizin of the true owners. *Cochran v. Whitesides*, 34 Mo. 417. But even if plaintiff could recover such rents and profits in a separate action, he still is entitled in this action to a judgment for them, as damages, and to his costs which have accrued in consequence of the wrongful withholding of defendants prior to the time of plaintiff's obtaining possession. This question has been before the courts of other states, and has been decided in accordance with the views here presented. *Price v. Sanderson*, 3 Harrison (N. J.) 426; *McChesney v. Wainright*, 5 Ham.

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(Ohio) 452; *Venner v. Underwood*, 1 Root (Conn.) 73; *Tyler v. Canaday*, 2 Barb. (N. Y.) 160. Mrs. McKinney was an unnecessary party, her possession being that of her husband. *Bledsoe v. Simms*, 53 Mo. 305; *Cooper v. Ord*, 60 Mo. 430. But the judgment, although a nullity as to her, was valid as to her co-defendants. *Wernecke v. Wood*, 58 Mo. 358. Besides, the judgment can be amended by striking out the name of Mrs. McKinney. *Weil v. Simmons*, 66 Mo. 619.

M. T. C. Williams, T. J. Whiteman, and L. H. Waters for appellant Crispen, in cause number 1465.

(1) The decision of the court below was such a judgment as entitled plaintiff to appeal. R. S. 1879, sec. 3710, p. 632; *McCormack v. McClure*, 6 Blackf. (Ind.) 467; *Breading's Heirs v. Taylor*, 6 Dana (Ky.) 226; *Barry v. Briggs*, 22 Mich. 201; *Towle v. Smith*, 27 Wis. 268; *Wakely v. Delaplaine*, 15 Wis. 554; *Gale v. Michie*, 47 Mo. 327; *Bruce v. Vogel*, 38 Mo. 100. (2) The decision on the motion was the end of it as much as if the motion had been in the form of a petition. *James ex parte*, 59 Mo. 284. (3) The appellant had a right to a jury on the question of rents and profits. *Cummings v. Noyes*, 10 Mass. 433. (4) The rights of third parties are not divested by restitution. *Gott v. Powell*, 41 Mo. 420; *Vogler v. Montgomery*, 54 Mo. 577. (5) There was no evidence to sustain the judgment rendered on defendants' motion in the court below. There was no attempt to prove the value of the rents and profits of the premises from the time plaintiff took possession, in October, 1875, until March, 1881. If defendants desired to recover rents and profits for the time plaintiff was in, they should have resorted to their action therefor. *Hawley v. Brown*, 43 How. Pr. 17; *Gott v. Powell et al.*, 41 Mo. 420.

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Prosser Ray, J. L. Mirick, and Hale & Sons for respondents Hannovan *et al.*, in cause number 1465.

NORTON, J.—The plaintiff, Ephraim P. Crispen, brought an action of ejectment for the recovery of the southeast quarter of section seven, in township fifty-three, north, in range twenty-one, west, in Carroll county, Missouri, February 15, 1869, against the ancestor of the defendants, whose death was suggested, and the case properly revived. At the September term, 1875, said cause was tried, and plaintiff recovered all of said tract, except eleven acres off of the west side thereof. An appeal to the Supreme Court was allowed defendants at said term, but no appeal bond was given. On the twenty-sixth of October, 1875, the plaintiff, under a writ of possession of said Carroll circuit court, was put in possession of the premises so recovered, and still retains the same, except as hereinafter stated. Defendants thereafter prosecuted their appeal to the Supreme Court, and at the October term, 1880, of said court, said cause was reversed and remanded, and a mandate in the usual form was issued to the Carroll circuit court.

At the March term, 1881, of said circuit court, defendants filed in said court their motion asking that an execution issue against Crispen, requiring the sheriff to restore to defendants below the possession of the real estate which they had lost by virtue of the former judgment and execution thereunder; also, for costs, damages, rents, and profits, collected on said execution. Plaintiff filed objections to the hearing of this motion on the following grounds:

1. That said cause was placed upon the docket of the said March term, 1881, for trial on the twenty-fifth of March, and the fifth day of said term, and that said cause was called for trial, and plaintiff announced that he was ready for trial.

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2. That defendants' said motion was not filed until March 29, being the eighth day of said term, and that no notice was given plaintiff of the filing of the same before the same was filed.

3. That said motion was filed for delay, and that the same has nothing to do with the merits of the case.

These objections were overruled, to which plaintiff excepted, and thereupon he filed an answer to the motion to the effect that in September, 1880, while the judgment rendered in his favor, in 1875, remained in full force and unreversed, leased ninety acres of the land recovered by him, to one Wilkerson, for one year from that date, who planted it in wheat, and was still in possession of the same under said lease. That no part of the damages recovered by him in said judgment were paid by, or collected from, defendants, and that he had repaid all costs collected of defendants. This answer was sworn to by plaintiff. On the hearing of the motion, the judgment, writ of possession, and mandate of this court were read in evidence, whereupon the court sustained the motion, and ordered an execution to issue restoring defendants to the possession, and rendering judgment in favor of defendants for nine hundred and fifty dollars, for rents and profits while plaintiff was in possession from October 26, 1875, to March, 1881. It is from this action of the court that plaintiff appeals.

This case was argued in connection with the case number 1753, of *Crispen v. Hannovan et al.*, which, upon the reversal by this court of the judgment rendered therein in 1875, was again tried at the July term, 1881, of the Carroll circuit court, and judgment rendered for plaintiff for six of the eleven acres not recovered by him in the former judgment, and from which defendants have appealed. Both these cases having been argued in this court together, and each being so dovetailed into the other that the consideration and determination of them separately would operate to the prejudice of one or both

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parties, we feel justified in considering them together. It seems to be conceded that the evidence adduced on the trial of the ejectment suit, had in July, 1881, showed a complete and perfect paper title to the lands sued for to be in the plaintiff, and that defendants, being without color of title, rested their claim to defeat plaintiff's recovery on the sole ground of an open, notorious, actual adverse possession for such length of time as, under the statute of limitations, barred plaintiff's right of action. It appears that by reason of the fact that Crispen, when he appealed from the order and judgment of the circuit court, made at its March term, 1881, directing the restoration to defendants of the possession of the land lost by the judgment in 1875, gave bond, which operated as a *supersedeas*; that at the trial of the ejectment suit in July, 1881, he, Crispen, was still in possession of all the land into which he had been put under the execution which issued on the judgment obtained by him in 1875, which judgment was afterwards reversed by this court in 1880. At the close of plaintiff's evidence the record shows that he waived any claim for damages as against the defendants for the time they occupied the land after their father's death up to the time of the trial. The court found for plaintiff, except as to five acres off the west end of the land, and gave judgment against the administrator of Bernard Hannovan, deceased, the ancestor of defendants, for five hundred dollars damages, and ascertained the monthly rental value of the additional six acres recovered in this suit to be one dollar.

The chief error assigned by defendants, on their appeal from this judgment, is the alleged error of the court in giving and refusing instructions. The defendants asked three instructions, two of which were to the effect that if plaintiff recovered judgment, in 1875, for the possession of all the land in suit, except eleven acres off the west side thereof, and was put in possession under said judgment, which was subsequently reversed by this court,

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which issued its mandate to restore to defendants all things lost by said judgment, and that defendants had not been restored to the possession, but that plaintiff was still in possession, the finding should be for defendants.

The third instruction was to the effect that if the land in controversy was military bounty land, and that defendants, and those under whom they claim, had been in the actual, open, and adverse possession of eleven acres off the west side of said land for more than two years prior to the judgment of the Supreme Court, rendered in this cause, reversing the former judgment and remanding the cause, that then the defendants have acquired title to said eleven acres by limitation.

These instructions were refused. The first two were rightfully refused, if upon no other grounds than that if plaintiff had a right to the possession of the land in controversy at the time the action was commenced, and defendants, or those under whom they claim, were at that time in possession, it is sufficient to authorize a recovery. R. S., sec. 2247. Besides this, sections 2256 and 2257, Revised Statutes, indicate that a judgment in ejectment may be for possession and damages, or for damages and costs only, and by section 2253 it is provided that when the right of plaintiff to possession expires after the commencement of the action, the plaintiff is entitled to damages and costs. These two instructions were also properly refused under the following authorities, which establish the proposition that, though a plaintiff may come into the possession of the land after his ejectment has been commenced, and during its pendency, he is nevertheless entitled to costs and mesne profits; *Price v. Sanderson*, 3 Harrison (N. J.) 426; *McChesney v. Wainwright*, 5 Hammond (Ohio) 452; *Venner v. Underwood*, 1 Root (Conn.) 73.

The third instruction was also properly refused. The judgment rendered in 1875, which was reversed on defendants' appeal, was an entirety, and the only effect

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of such reversal was to "restore the parties to the same condition in which they were prior to the rendition of the judgment. The judgment reversed becomes mere waste paper, and the parties to it are allowed to proceed in the court below to obtain a final determination of their rights in the same manner and to the same extent as if the cause had never been heard or decided by any court. Neither, in the subsequent prosecution of the cause, can suffer detriment nor receive assistance from the former adjudication." Freeman on Judgments, sec. 481.

It is further insisted that the judgment is erroneous in this, that Mary McKinney, one of the defendants, who was joined with her husband as a party, and against whom it was rendered, was a married woman. While this is an error, it is not such an one as necessarily leads to a reversal of the judgment, inasmuch as, under the rulings of this court, in the cases of *Cooper v. Ord*, 60 Mo. 430, and *Bledsoe v. Simms*, 53 Mo. 305, she was not a necessary party, and inasmuch as it has been held in the cases of *Weil v. Simmons*, 66 Mo. 619, and *Cruchon v. Brown*, 57 Mo. 39, that this court may, and will, in furtherance of justice, correct the error by modifying the judgment and striking out the name of such party. In view of the length of time this litigation has lasted we do not believe the purposes of justice would be subserved by reversing the judgment and remanding the cause for the error above indicated, and we will modify it by striking out therefrom the name of Mary McKinney and affirm the judgment so modified, and, inasmuch as defendants were driven to an appeal to correct this error, the costs of the appeal are hereby adjudged against the plaintiff.

In case number 1465, the judgment of the circuit court, awarding execution for restitution of part of the premises to defendants, and for nine hundred and fifty dollars damages, will be reversed for the reason that there was no evidence before the court upon

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which to base the finding in respect to the damages, and for the further reason that in the trial of the ejectment suit, no claim for damages was made, and none were allowed against defendants for the time plaintiff had possession of part of the land under the reversed judgment. The judgment in said case number 1465 will be reversed and cause remanded with directions to the circuit court to enter up judgment against plaintiff only for such cost and damages as an investigation may show defendants actually paid on the execution which issued on the said judgment rendered in 1875, and which have not been paid by plaintiff Crispen. All concur, except Judge Ray, who did not sit in the case.

THE STATE V. SEARS, *Appellant*.

1. **Indictment: FELONIOUS ASSAULT.** An indictment under Revised Statutes, section 1263, charging that defendant assaulted another by pointing a gun at the latter with the intent to maim and kill him is not defective in only alleging that the gun was loaded with gunpowder. Serious injury can be inflicted with a gun so loaded.
2. **Criminal Law: FELONIOUS ASSAULT: INSTRUCTIONS.** The evidence was to the effect that defendant pointed a loaded rifle at one W. and threatened to shoot him if he did not leave a certain field of which he was in possession, and in which he was at work, and that defendant and W. were then from thirty to fifty feet apart. There was no evidence as to whether one, with a gun so loaded and at the distance stated from another, could have killed or maimed the latter. *Held*, that the court rightly refused to instruct the jury, for the defendant, that, if they should believe from the evidence that on account of the distance between the parties at the time, a discharge of the rifle by defendant, loaded as charged, could not have killed or maimed W., they should acquit.
3. **Common Assault: INSTRUCTION.** An instruction for the state to

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the effect that if defendant assaulted W. by pointing a loaded gun at him in a threatening manner and cocking it within shooting distance of him, they should find defendant guilty of common assault, *held* erroneous.

4. ———. An intention on the part of the accused to do the other party some bodily harm is essential to constitute an assault.
6. **Criminal Practice: ASSESSMENT OF PUNISHMENT.** Where the jury assess the punishment below the legal limit allowed by law for the offence of which they find defendant guilty, it is the duty of the court to sentence the defendant according to the lowest limit prescribed by law in such case.
7. **Indictment: PROSECUTOR.** Where an indictment is for a felony, the name of the prosecutor is not required to be endorsed thereon, although under the indictment the defendant may be convicted of an offence which is only a misdemeanor.

Appeal from Caldwell Circuit Court.—HON. JAMES M. DAVIS, Judge.

REVERSED.

C. S. McLaughlin for appellant.

(1) The indictment charges the defendant with a felony, if he is charged with any offence, and under the instructions of the court he was found guilty of a misdemeanor, which cannot be legally done. 1 Bishop's C. L., secs. 814, 823; *State v. Hilderbrand*, 5 Mo. 548; *People v. Adams*, 17 N. W. Rep. 226. In case of misdemeanor a prosecutor's name must be indorsed on the indictment and he is liable for all costs; one guilty of a simple assault should not be required to bear all the burdens that attend the trial of a felony. (2) A gun containing gunpowder is not a loaded gun, and pointing an unloaded gun at a person is no offence. *Reg. v. James*, C. & K. 530; *Robinson v. State*, 31 Texas, 170; *McKay v. State*, 44 Texas, 43; *Blake v. Bornerd*, 9 C. & P. 626. (3) The first and second instructions for the state were erroneous.

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B. G. Brone, Attorney General, for the state.

(1) The indictment is based upon section 1263, Revised Statutes, 1879. It clearly describes the offence in the language of the statute. This is all that is necessary. *State v. Chumley*, 67 Mo. 41. (2) It was not necessary that the prosecutor's name should be indorsed on the indictment. The defendant is charged with a felony and the indictment does not come within the provisions of section 1800, Revised Statutes. (3) The evidence was sufficient to support the verdict. *State v. Epperson*, 27 Mo. 255. An assault with intent to kill may be made though there is no striking or wounding. *State v. McClure*, 25 Mo. 338. The intent with which the assault was made is proved by the threat of defendant at the time he raised the gun to his shoulder and pointed it at Whidby. *State v. Painter*, 61 Mo. 84, and cases cited. (4) The instructions given on behalf of the state are more favorable to the defendant than otherwise and he cannot complain. The instructions asked on behalf of defendant, and refused by the court, did not properly declare the law nor state the facts as detailed in evidence, and were properly refused. (5) Although defendant was indicted for a felonious assault, under section 1263, Revised Statutes, his conviction for a common assault was proper and authorized by law. Sec. 1655, R. S., 1879; *State v. Davidson*, 73 Mo. 428. (6) The jury was authorized, under the instructions, in assessing the fine of \$20.00. Sec. 1265, R. S. The indictment contained but one count and it is clear that the jury found defendant guilty of a common assault. The words "as charged in the indictment," may be rejected as surplusage, but see *State v. Matrassey*, 47 Mo. 295.

HENRY, C. J.—At the October term, 1881, of the

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Caldwell circuit court, the following indictment against the appellant was preferred by the grand jury :

"The grand jurors, for the state of Missouri, from the body of Caldwell, having first been duly empaneled, charged and sworn upon their oaths, do present: That on the thirtieth day of June, 1881, at and within Caldwell county, one Timothy R. Sears, being then and there armed with a certain firearm, known as rifle, which was then and there loaded with gunpowder, and was then and there a deadly weapon in his hands, in and upon one Thomas Whidby, then and there in the peace of the state being, unlawfully and feloniously did make an assault, and did point said rifle at said Thomas Whidby, and attempt to discharge and shoot the contents thereof into the body of said Thomas Whidby with intent then and there to maim and kill the said Thomas Whidby, against the peace and dignity of the state." The defendant was convicted and his punishment assessed at a fine of twenty dollars, and he has appealed from the judgment.

The indictment is based upon section 1263 for an assault with intent to commit a felony, the maximum punishment for which is imprisonment in the penitentiary, and the minimum, a fine of one hundred dollars. It is contended that the indictment is defective, in not alleging that the charge with which the gun was loaded contained a leaden ball; that a gun charged with gunpowder is not a loaded gun. As a matter of fact, we know that a very serious injury could be inflicted with a gun so loaded, and are not prepared to assent to appellant's proposition. It is held by some authors, and has been so decided by respectable courts, that an assault may be made with an unloaded gun, known to be in that condition by the assailant, if not known to the other party; but we do not give our assent to that proposition.

The testimony was to the effect that, on the thirtieth day of June, 1881, the defendant pointed a loaded rifle

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at Thomas Whidby, and threatened to shoot him if he did not leave a certain field, of which he was in possession, and in which he was at work ; and that defendant and Whidby were then from thirty to fifty feet apart. This was all the evidence, and defendant asked the court to declare that if the jury believed from the evidence that on account of the distance between the parties, at the time, a discharge of said rifle by defendant, loaded as charged in the indictment, could not have killed or maimed Whidby, they should acquit him. There was no evidence as to whether, with a gun so loaded, one thirty or fifty feet from another, could have killed or maimed the latter. For that reason alone, the instruction was properly refused.

The first instruction given by the court for the prosecution is erroneous. It declares that if defendant assaulted Whidby, by pointing a loaded gun at him, in a threatening manner, and cocking it within shooting distance of Whidby, the jury should find defendant guilty of a common assault. The charge in the indictment is, that he not only pointed the gun at Whidby, but attempted to shoot its contents into his body, with an intent to maim and kill him. It is not charged in the indictment that the gun was pointed at Whidby, in a threatening manner, and while the instruction entirely ignores the attempt to discharge the gun, with the intent alleged, it submits the question of the manner in which it was pointed, which was not alleged. If the indictment had alleged no more than the facts upon which the instruction authorized a conviction, it would have been defective. It would then have been substantially that defendant, on, etc., with a rifle loaded with gunpowder, made an assault upon Whidby by pointing said rifle at him in a threatening manner. Simply pointing a loaded rifle at one is not necessarily an assault, for that may be done in sport in a threatening manner, with no intention to shoot or otherwise injure the other party.

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Hawkins defines an assault as: "An attempt or offer, with force and violence, to do a corporal hurt to another." 1 Hawk. P. C., sec. 1, p. 110. In *Johnson v. State*, 35 Ala. 363, an assault is defined as: "An attempt or offer to do another person violence without actually accomplishing it. A menace is not an assault, neither is a conditional offer of violence. There must be a present intention to strike." See also, to the same effect: *Lawson v. The State*, 30 Ala. 14; *Traver v. The State*, 43 Ala. 354; 2 Wash. C. C. R. 435. In *The State v. Davis*, 1 Iredell, Garton, J., said: "An assault is an intentional attempt, by violence, to do an injury to the person of another. It must be *intentional* for, if it can be collected, notwithstanding appearances to the contrary, that there is not a *present* purpose to do an injury, there is no assault." *People v. Yslas*, 27 Cal. 630. Mr. Bishop, in his work on Criminal Law, says that: "If one within shooting distance, menacingly, by pointing at another with a gun, apparently loaded, yet not loaded in fact, he commits an assault, the same as if it were loaded." This, however, is a mooted question, and the authorities are numerous on either side of the proposition. Of course, the appearance, in such a case, will justify defensive action on the part of the person thus assaulted, although the other party neither intended nor possessed the ability to do the wrong apparently threatened.

But we think that the weight of authority supports the view that an intention, on the part of the accused, to do the other party some bodily harm, is essential to constitute an assault. It may be that if one points a gun at another, supposing it to be loaded, with the intent to shoot him, it would be a criminal assault, but knowing that the gun had no charge in it, he could not possibly have intended to injure the other party by shooting him. The fact that the other party supposed the gun loaded would afford a good excuse for his re-

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sort to defensive means, but could not make it a criminal assault when, notwithstanding the appearance, there was no intention to harm him. It is difficult to conceive one guilty of a crime which he did not intend to commit. Mr. Bishop approvingly cites a case in which the defendant raised his whip and shook it at the prosecutor within striking distance, remarking: "Were you not an old man, I would knock you down," and the court held that it was not an assault, because the accompanying words "took away the idea of an intent to strike." *Commonwealth v. Eyre*, 1 S. and R. 346. The facts in the case supposed, of one presenting a gun which he knows is not loaded, as clearly "takes away the idea of an intention" to shoot as the means employed in the case cited took away the idea of an intention to strike.

The judgment is also erroneous in the amount of fine imposed. The verdict was that defendant was guilty as charged, and yet the punishment assessed was only such as might have been imposed for a common assault, under section 1255, Revised Statutes. Under the indictment the jury could have found him guilty of a common assault. Section 1655. It was the duty of the court when the jury returned their verdict to disregard so much as assessed the punishment, and render a judgment according to the lowest limit prescribed in section 1263, one hundred dollars.

Defendant was indicted for a felony, and the statute does not require that the name of the prosecutor be endorsed upon such an indictment, although under the indictment the accused may be convicted of an offence that amounts only to a misdemeanor.

All concur in reversing the judgment and remanding the cause.

Coombs v. Coombs.

COOMBS, *Curator*, v. COOMBS, *Executrix*, *Appellant*.

The judgment of the circuit court, reversing that of the probate court, for errors committed by the latter court in the admission of evidence, affirmed.

Appeal from Greene Circuit Court.—HON. J. C. CRAVENS, Special Judge.

AFFIRMED.

John O' Day and *E. D. Kenna* for appellant.

C. W. Thrasher for respondent.

BLACK, J.—John Coombs, as curator of Leslie Coombs, filed his account in the Greene probate and common pleas court for allowance against the estate of William Coombs, who died in 1880. The account is for various items of money of the ward, advanced or loaned to William Coombs from January to June, 1879, amounting to some five hundred dollars or more. William Coombs had been appointed curator of this minor, but, failing to give bond, John Coombs was appointed curator for Leslie and Catharine Coombs.

Plaintiff's evidence showed that the items of money, with one or two exceptions, were paid to William by checks, signed by John as curator of Leslie. It also tended to show that William claimed the right to handle these funds; that he understood the money was from the ward's estate, and had agreed to give a note and security therefor, but failed so to do, before his death.

The defence was, that the money was paid to him, William, in discharge of debts due to him from John, for services rendered to the firm of H. O. Dow & Co., of which John was a member, and for other services.

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The finding and judgment was for defendant. The circuit court heard the cause on errors alleged to have been made by the probate court, in the admission of evidence for the defendant.

1. Witnesses were permitted to testify as to the probable annual expense of William E. Coombs, in the support of himself and family. Defendant had shown that the salary of William, with H. O. Dow & Co., was from fifty dollars to sixty dollars per month. The evidence was probably offered to show, or as tending to show, an indebtedness to him on that account, but it was of no value for that purpose. An indebtedness cannot be established by such testimony. Besides, much of it was no more than the opinion of witnesses as to his probable expenses.

2. The inventory of the estate of William E. Coombs, and the settlement of John Coombs, as curator of Catharine Coombs, should have been excluded. They neither proved, nor tended to prove or disprove, any issue in the case. The executrix could not make evidence in that way, and the settlement had no relevancy whatever.

3. A paper purporting to be a statement of accounts from 1875 to 1877, between John and William, showing a balance of \$595.80 due to William, under date of January 1, 1878, was also read in evidence. To overcome the case made by the plaintiff, it devolved upon the defendant to show: (1) That John Coombs was indebted to William. (2) That the moneys sued for were not received by William as the moneys of the ward's estate, but were paid and received in discharge of such individual indebtedness. The paper being in the hand-writing of John Coombs, it was admissible as against him, and tended to show an indebtedness to William at that date, and for that purpose it was competent and proper evidence.

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4. The statements, found in what is called the "blank memorandum book," in the hand-writing of William E. Coombs, were no more than memorandums of three items of what had transpired in the probate court. If these three items had been allowed, one against the estate of David Coombs, one against each of the wards' estates, as they purport to have been, then the records were the best evidence. They were, at most, only private memorandums, not book accounts, and, therefore, inadmissible. 1 Greenleaf on Evidence, secs. 117, 118. The record shows that the paper known as "X," was excluded, and no more need be said of it. If there was a balance for board of the ward due to William, that, of course, should be allowed on plaintiff's theory of the case. Part of this evidence admitted, and which should have been excluded, was of little value, but as there was so much of it, and it would seem to have had some influence in the disposition of the case in the probate court, we think the circuit court did right in reversing the judgment.

The judgment of the circuit court is affirmed. All concur.

SMITH *et al.* v. ALLEN *et al.*, *Appellants.*

1. **Principal and Agent : SALE OF LAND : CONTRACT.** The owner of real estate situated in Kansas City, in this state, wrote from Chicago, Illinois, where he resided, to his agent, at Kansas City, in terms as follows : "Your letter received last night ; I will leave the sale of the lots pretty much with you ; if the party, or any one, is willing to pay sixty dollars per foot, one-third cash and balance one and two years, interest seven per cent. per annum, and pay commission of sale, I think I am willing to have you make out a deed and I will perfect it ; I think you have the deeds to those lots, have you not ? If you think better to try spring market, hold till

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then ; the party buying may want the abstract in full, which I believe I have at Rockford, and will sell much less than cost. The above price is only for the present. * * * It is understood that if I pay the taxes now due, that hereafter I am relieved from any taxes." *Held*, that the letter authorized the agent to make a contract for the present sale of the lots.

2. — : —. Where such agent has the power to sell, he has the authority to sign an agreement in his principal's name and to bind him thereby.

Appeal from Jackson Circuit Court.—HON. T. A. GILL,
Judge.

AFFIRMED.

Gage, Ladd & Small for appellants.

(1) Allen's letter of November 19, 1879, did not authorize the execution of a contract of sale. *Rowan v. Hyatt*, 45 N. Y. 138. (2) But even if the letter be construed more strongly against Allen, and it be found therefrom that he had determined to sell at the price named, still no authority was conferred on Webster to make and sign a contract of sale. *Bosseau v. O'Brien*, 4 Biss. 395 ; *Taylor et al. v. Merrill*, 55 Ill. 55 ; *Duffy v. Hobson*, 40 Cal. 240 ; *Bissell v. Terry et al.*, 69 Ill. 184 ; *Stewart v. Wood et al.*, 63 Mo. 252 ; Story on Agency, sec. 82 ; Pomeroy Spec. Perf., pp. 113, 114, and note. (3) The contract is not pursuant to the terms of the letter of November 19, and is not authorized by it. The terms of the sale prescribed by the letter were one-third cash. The terms of this contract were ten dollars cash. If this be a contract of sale, it was wholly unauthorized.

C. O. Tichenor and *P. S. Brown* for respondents.

(1) The action is upon a contract, and the question of the authority of an agent to sign the same is one of evidence and not of pleading. *Stein v. Repy*, 46 Mo. 606. (2) Under the statute of frauds, the note or mem-

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orandum could only be signed by the party, "or his agent authorized in writing." (3) Whether the agent had authority to make the contract was a question of fact. The trial court found that he had authority and the Supreme Court will defer to such finding. *Chapman v. McIlwraith*, 77 Mo. 43; *Chouteau v. Allen*, 70 Mo. 333. (4) The construction of Allen's letter should be adopted which is most beneficial to the plaintiffs. *Clemens v. Patten*, 34 Mo. 584; *Hoffman v. Ins. Co.*, 32 N. Y. 413. (5) It was sufficient to establish the agency by direct evidence showing his appointment, but it is sufficient, if, from all the circumstances in evidence, he is shown to have authority. *Hall v. Jones*, 69 Mo. 587; *State, etc., v. Gates*, 67 Mo. 143; *Edwards v. Thomas*, 66 Mo. 482; *Geylin v. De Villeson*, 2 Hous. 319; *Pringle v. Spaulding*, 53 Barb. 17; *Johnson v. Dodge*, 17 Ill. 441. (6) The letter, by its terms, authorized the agent to execute a contract of sale. *Vanadas v. Hopkins*, 1 J. J. Marsh. 285; *Talbot v. Bowen*, 1 A. K. Marsh. 436; *Lyon v. Pollock*, 99 U. S. 668; *Minn. v. Willoughby*, 3 Minn. 234; *Farris v. Martin*, 10 Humph. 496; *Matherson v. Davis*, 2 Cald. 453; *Duffy v. Hobson*, 40 Cal. 244; *Bosseau v. O'Brien*, 4 Biss. 396. (7) The letter of November 19, not only authorized Webster to make the contract, but it was of itself a sufficient note or memorandum to comply with the statute, and when plaintiffs notified Webster of their acceptance, Allen was bound, even though Webster had not drawn up and signed a further memorandum. Waterman on Spec. Per., secs, 231, 232, 233, 234; *O'Neil v. Crain*, 67 Mo. 250; *Richey v. Tenbroeck*, 63 Mo. 569. And the letter would be sufficient, though addressed to a third party. *Moore v. Mountcastle*, 61 Mo. 424. In *Tallman v. Franklin*, 14 N. Y. 584, it is held that the letter to an agent, and the memorandum made by the agent, can be construed together as a contract. See *Briggs v. Munchon*, 56 Mo. 467.

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RAY, J.—The defendant, Loren S. Allen, at the date of the principal transaction under consideration, was a resident of Chicago. About, or during the year 1868, he became the owner of certain lots in Kansas City, which are the subject of the present controversy. From that date until about the close of the year 1879, one Webster, a real estate agent in Kansas City, was Allen's agent to look after said property, to pay the taxes thereon and to find him a purchaser therefor, the same being for sale during said years. The plaintiffs, Smith & Keating, were partners composing a real estate firm, residing in and dealing in real estate in Kansas City. About November 1, 1879, one Rickard, who was, it seems, also a real estate agent in Kansas City, and acted in this matter in connection with Webster in trying to find a purchaser for Allen's said lots, opened negotiations for the sale thereof with said plaintiffs, by telling them that Webster had said lots for sale at and for the price of sixty dollars per foot. Smith & Keating offered Webster, through Rickard, fifty-five dollars per foot, which proposition Webster submitted to Allen, who rejected the same. Webster, a few days thereafter, wrote Allen that he thought these parties offering the fifty-five dollars per foot would give sixty dollars per foot. Thereupon, Allen wrote a letter of date November 19, 1879, which letter is as follows:

“HYDE PARK, Nov. 19, 1879.

“FRIEND WEBSTER: I am sick and not able to write; your letter received last night; I will leave the sale of the lots pretty much with you; if the party, or any one, is willing to pay sixty dollars per foot, one-third cash and balance one and two years, interest seven per cent. per annum, and pay commission of sale, I think I am willing to have you make out a deed and I will perfect it; I think you have the deeds to those lots,

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have you not? If you think I better try spring market, hold till then; the party buying may want the abstract in full, which I believe I have at Rockford, and will sell much less than cost. The above price is only for the present. Excuse this letter.

“Truly yours,

“(Signed)

L. S. ALLEN.

“It is understood that if I pay the taxes now due, that hereafter I am relieved from any tax.”

On November 22, Rickard and Webster went to the office of Smith & Keating and submitted to them the said letter of November 19, from Allen. Smith & Keating accepted the proposition, paid the ten dollars mentioned, and took from Webster the following agreement and receipt, which is the contract sued on:

“KANSAS CITY, Mo., November 22, 1879.

“Received of Messrs. Smith & Keating the sum of ten (\$10) dollars as earnest of the purchase money of one hundred and seventy-two feet on Fourth street, running through to Third street, in block twenty-three, Old Town, now City of Kansas, Missouri, being part of lots 225, 226, 227, 228, 229, and 230, block twenty-three, and the old alley running north and south through said block twenty-three, which price is to be sixty dollars per foot on Fourth street, running from street to street, to be paid one-third cash, and one-third in one (1) and the remaining third in two years, with seven per cent. interest on the deferred payments, secured upon the property. The sale being understood to be null, unless the title to the real estate is satisfactory to said purchaser.

“L. S. ALLEN,

“By ED. H. WEBSTER.”

Smith & Keating then took and have ever since retained possession of Allen's letter of November 19. After

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making said agreement, Webster wrote Allen the following letter, dated the same day :

"ED. H. WEBSTER, REAL ESTATE AND LOAN BROKER, }
"No. 603 MAIN ST., }
"KANSAS CITY, MO., NOV. 22, 1879. }

"*Dr. L. S. Allen, No. 103 State St., Chicago, Ills.:*

"MY DEAR SIR: Your favor, November 19 inst., duly received. I do not like to assume the responsibility of deciding whether it is best to sell your property now. I should feel inclined, if it was mine, from the class of improvements going in that direction, to sell. I can't guess whether it would be better (that is, I can't determine), to wait until spring or sell now. I have agreed with Messrs. Smith & Keating to take the ground, subject to your approval, at sixty dollars per foot, upon the terms named in your letter, one-third cash, one-third one and one-third two years, with interest at seven per cent. They do not wish to pay for the abstract, claiming that you should furnish the abstract of title as you already have it. I think this a good price for the present, although it may bring a better price by waiting. Please advise me by wire at my expense.

"Yours truly,

"ED. H. WEBSTER."

Allen answered the same by the following letter :

"CHICAGO, Nov. 28, 1879.

"*E. H. Webster:*

"DEAR SIR: Yours of date of twenty-second and mailed twenty-sixth, came to me this morning; and I am undecided about taking the offer of sixty dollars per foot, though think, on the whole, I will take my chances for a spring sale. Perhaps, I miss it, but from the present outlook, I think it will bring more if local prejudices don't kill the market. I should have answered

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by wire, but the letter was too old before I got hold of it, and will wait the mail. You will please keep me posted from time to time, and in due time make a sale.

"Truly yours,

"L. S. ALLEN."

Webster replied thereto, as follows:

"ED. H. WEBSTER, REAL ESTATE AND LOAN BROKER, }
"No. 603 MAIN ST., }
"KANSAS CITY, MO., Dec. 6, 1879. }

"*Dr. L. S. Allen, No. 103 State St., Chicago, Ills.:*

"DEAR SIR: Upon the receipt of yours, nineteenth ult., I notified a Mr. Rickard (real estate agent) who was negotiating for Smith & Keating for the purchase of your land on Third and Fourth streets, and gave the letter to him to show to Messrs. S. & K. Within a day or two he came and wanted to pay me something upon the purchase, as he said they wished to take it upon your terms. I told him that I would not receive anything until I saw Messrs. S. & K., and explained to them that I did not pretend to have any authority to sell, except that which was embraced in your letter of the nineteenth of November, which they had in their possession, and that if I accepted a payment, I did not wish them to say that I was not a man of business if you did not confirm the sale. I called upon them, discussed the matter fully, and accepted ten dollars and made an agreement and wrote you letter twenty-second November. After receipt of yours declining, I notified them, but they insist upon the contract and threatened to sue for specific performance of their contract made with me. I think they only wish to try and scare you into making a deed, and am satisfied my contract amounted to nothing.

"Yours truly,

"ED. H. WEBSTER."

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The above constitutes the entire correspondence set out in the record. About December 20, 1879, the defendant, Hews, who resided in Kansas City, called upon Allen, in Chicago, with a letter of introduction from Webster, and, upon the next day, Allen sold the lots in suit to Hews, at and for the price of sixty dollars per foot, \$2,300 being paid down at that time, and the balance about the first of May following, when the deed was made.

Mr. Ladd testified, that in February or March, 1880, as attorney for Hews, he examined the title to this property and looked over the papers on file in this suit, including the contract now sued on, and that he went to the plaintiff, Keating, and read said letter of date of November 19, and that he afterwards, and about May 3, 1880, paid to Allen, for Hews, the balance of the purchase money, which amounted to something over \$8,000.

The action is one for the specific performance of said alleged contract, and was begun in the circuit court of Jackson county, February 5, 1880, against the defendant Allen. The petition sets forth the contract as follows :

“That on said twenty-second day of November, 1879, and for a long time previous thereto, Edward H. Webster, of the City of Kansas, in said county, was the duly authorized agent of defendant; that previous to said twenty-second of November, 1879, to-wit: on or about the nineteenth day of November, 1879, said defendant, in writing, by him duly signed, duly authorized and empowered the said Webster, as such agent, in the name and stead of defendant, to enter into contract in writing with, and sell to, said plaintiffs the whole of said described real estate, at the price of sixty dollars per front foot, on the terms of one-third cash on delivery of deed, and the remainder in two equal payments, at one and two years, with interest thereon at the rate of seven per cent. per annum; that in pursuance of the power

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and authority so granted to said Webster, the said Webster, on said twenty-second day of November, 1879, as such agent, in the name of said defendant, did enter into a written agreement with plaintiffs, whereby defendant, through and by said agent, duly sold to plaintiffs all the aforesaid described real estate, at and for the said price of sixty dollars per front foot, being in the aggregate the sum of ten thousand, three hundred and twenty dollars, payable as follows: one-third, to-wit: three thousand, four hundred and forty dollars, cash, upon the delivery by defendant to plaintiffs of a general warranty deed to said real estate; and one-third, to-wit: three thousand, four hundred and forty dollars, in one year from the date of the delivery of such deed; and the remaining one-third, to-wit: three thousand, four hundred and forty dollars, in two years from the date of the delivery of such deed, said deferred payments to bear interest at the rate of seven per cent. per annum, and that said defendant was to execute and delivery such general warranty deed to plaintiffs without delay, and thereupon they, plaintiffs, were to pay said cash payment and execute their promissory notes for said deferred payments, and a deed of trust on said described real estate securing the payment of said notes, and deliver such notes and deed of trust to said defendant."

The answer of defendant Allen was filed February 14, 1880, and was a general denial. Upon motion of Allen, the defendant Hews was made a party defendant, who, on June 16, 1880, filed his separate answer, admitting the ownership of Allen on the said November 22, 1879, and denying all other allegations, and further answering and setting up that he was a *bona fide* purchaser, for value, of the property in suit and without notice of said alleged contract, which was denied by the replications of plaintiffs. The court found the issues and gave judgment for plaintiffs, and defendants have appealed therefrom to this court.

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The substantial controversy in this case is, whether Allen's letter, of November 19, authorized Webster to make the contract of date November 22. The letter is to be read in the light of the surrounding facts and circumstances. Allen, who was a non-resident, had taken the property for debt, in the first instance, and had, at all times, been anxious to sell and dispose of the same. The letter, it is true, was not addressed to the plaintiffs, but to Webster, who had his property for sale and was engaged in the business of selling real estate in Kansas City. Allen had recently rejected an offer from them of fifty-five dollars per foot, and he wrote said letter in reply to a second letter from Webster, to the effect that these parties would, he thought, give sixty dollars per foot. The appellants say that the entire effect of the letter is to say to Webster: "You can talk to the parties, find out what they will do, if they will pay sixty dollars per foot on the terms stated, see if they will buy my abstract, and write me the result, and give me your advice, and prepare and send me a deed to execute, and I think, if you so advise, I will sign it." But is this the true import thereof, when fairly and naturally read, and such as would readily be placed thereon by the people of common understanding in the usual and ordinary walks of life? Could Allen have apprehended that it would have meant this and no more, if shown to one who was desirous of purchasing the property and was satisfied with the price and terms given? If we may venture to indulge a paraphrase thereof, in illustration of what we think is the just and true construction and interpretation thereof, we would do so somewhat as follows: "I am willing that these parties, or any one, should have the lots at that figure, viz.: sixty dollars per foot, upon the following terms: one-third cash, and balance, one and two years, with seven per cent. interest per annum. They must pay your commission on sale. I will pay the tax now due, and must be relieved from liability for taxes

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hereafter. If you can get this price and these terms, you may sell now, and I am willing to have you make out a deed and I will perfect it. But I do not require you to do so. If you think I had better try the spring markets, you are authorized and at liberty to hold on until then. I leave the sale of the lots (that is, whether now or in the spring), pretty much with you. If the party buys and wants an abstract in full, I will sell mine at much less than cost."

The letter indicates that Allen does not mean to decide, peremptorily, which course was best to pursue, whether to sell the lots at that time, or to wait for an advance of market in the spring. On this question he is disposed to defer to the judgment of his agent, Webster, to which we are to ascribe and refer, we think, whatever of doubt may be implied by the language: "I think I am willing to have you make out the deed." Allen, at the date of the letter in question, was in Chicago, sick and unable to write. Webster, his agent, was in Kansas City, where the property in question was situated; he was a real estate agent and familiar with the value of the lots, the state of the market, and its probable rise or fall. These facts, to some extent, at least, may serve to explain and show why it was that Allen was willing to leave the sale "pretty much" to Webster; why it was that he thought he was willing to have him "make out" a deed, which he says he "will perfect;" and, also, why it was that he directed Webster to "hold till spring," if he thought he had better try the spring market. Why this concluding paragraph to the letter? It reads: "If you think I had better try spring market, *hold till then*," Why tell him to *hold till spring* if he had not authorized him to sell before, or thought he had done so? The injunction to hold *till spring*, if the agent thought best, clearly implies authority in the agent to sell before, if he thought best. This, evidently, was the interpretation Webster put upon the

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letter at the time, otherwise, he would not have signed the contract, and such, we think, is the fair import and true construction of the letter in question. Webster's subsequent letters of attempted explanation to the contrary are, we think, entitled to but little weight. The same may be said of Allen's subsequent letter. It is, we think, evidence of his vacillation, rather than the meaning of his original letter. It is manifest from the letter that Allen is satisfied with the price named, and determined to accept the same, if the agent, in the exercise of the discretion given him, concludes to make a present sale of the lots. It is plain that the trial court, under the facts and circumstances in evidence, so found, and so construed the letter, and we are not disposed, under the circumstances, to set aside its finding, or to say that it misconstrued the letter. As to all matters of fact, we are accustomed, even in equity cases, to defer somewhat to the finding of the trial court. *Chapman v. McIlwraith*, 77 Mo. 43, and cases cited.

The question then arises, whether an agent of this description, with a power thus conferred upon him to sell, has the power to make and sign such an agreement or memorandum in writing of the terms of sale, so as to be valid and binding upon his principal. Webster was authorized to sell at the price and upon the terms mentioned, and this implied authority to do everything necessary to complete the sale, and to make it effectual and binding. If the principal, Allen, had been conducting the trade in question, it would have devolved upon him (who was the party to be charged) to sign a memorandum or note in writing, evidencing the sale, before a valid sale thereof could have been made. And if it was thus incumbent upon the principal to do this to effect a valid sale, then, we think, in the case of an agent, authorized to make the sale, the power to sign such an agreement, either in his own name or in the name of his principal, is necessarily im-

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plied, for this is not only the usual and ordinary means of making and evidencing a sale, but is an indispensable pre-requisite, under the statute, to its validity. The agent could not, without so doing, negotiate and conclude a valid sale at the price and upon the terms offered, which was the purpose to be effected and contemplated by said letter and by said agreement, which may, we think, be read together. Without further discussion or elaboration of the question, the weight of authority is, we think, in favor of the power of the agent to sign an agreement, in writing, in the principal's name and to bind him thereby, where such agent has the power to sell conferred upon him in the manner and under the circumstances of this case. *Stewart v. Wood*, 63 Mo. 256; *Lyon v. Pollock*, 99 U. S. 668; *Johnson v. Dodge*, 17 Ill. 441; *Lawrence v. Taylor*, 5 Hill, 107; *Hawkins v. Chace*, 19 Pick. 502; *Pringle v. Spaulding* 53 Barb. 17; 2 Parsons on Cont. 291; Story on Agency, chap. 6.

A further objection is made, that the terms of the sale prescribed by the letter were one-third cash, and the terms of the contract were ten dollars cash, and that the contract is, therefore, not pursuant to the terms of the letter. The ten dollars was, as recited in said contract, paid as earnest of the purchase money. Said letter did not contemplate or require that the cash payment of one-third was to be made immediately upon the terms of the sale being agreed on, but such payment was to be cash, upon the delivery of the deed by Allen, and the delivery of the notes for the deferred payments and trust deed by the purchasers. The agreement is, we think, in substantial conformity with said letter.

It is further urged in appellants' behalf, that the acts and conduct of all the parties show that no valid and binding contract was made, and that they did not consider the written agreement valid and binding. Webster, it is true, wrote to Allen thereafter that he had

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made the sale subject to his approval, although this reservation was not expressed in the contract. Webster was not introduced as a witness on the trial, and the evidence of both plaintiffs and of Rickard is to the contrary. They all say, in substance, that Webster came to the office with Allen's letter, which he submitted. That he said he, Webster, was then authorized to sell at that price; that Allen was a peculiar and vacillating man, and that if they wanted the property they had better close the trade, and that upon their acceptance of the proposition, Webster wrote out the agreement himself, which, as we have seen, contains no reservation that the sale is made subject to Allen's approval. Nor can we see anything sinister, or even inappropriate, in the fact that Smith & Keating retained possession of the letter, as well as said contract. Nothing appears from the evidence to show that it was kept against the permission of Webster. And further, plaintiffs were about to conclude a purchase (which they afterwards did conclude) of a strip of ground seventeen feet wide, adjoining the lots in controversy, whose value depended almost entirely upon their acquiring the title to the Allen lots. Whether Allen was bound or not, depends upon the original and not the subsequent letter, and we do not see how Webster could help believing he had made an agreement, valid and binding, after stating that he had the authority to sell, and advising the plaintiffs to close the trade at once, and signing the same, and receiving the ten dollars paid thereon, and preparing the memorandum himself, and making an agreement with the plaintiffs, fixing his commission on the sale at two hundred dollars. And it is clear, we think, from the plaintiffs' evidence in the case, that they supposed before they saw the letter, and independent of the authority therein conferred, that Webster had the property for sale at sixty dollars per foot, and was authorized to sell the same at that price. We see nothing in the record

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proving their want of faith in the transaction. They have been at all times ready and willing to perform their part thereof, and have promptly insisted upon a like performance thereof by defendant Allen.

Nor do we understand that the defence of said defendant, or of his co-defendant, Hews, is based or founded in any alleged fraud in obtaining said contract, but is based, so far as Allen is concerned, exclusively upon the ground that the contract sued on was never, in fact, made or authorized. We do not see that the further defence of defendant Hews, viz. : that he was an innocent purchaser for value and without notice is seriously urged or presented. Hews was not introduced as a witness on the trial. Notice of this suit was filed for record and recorded December 6, 1879. Hews bore a letter of introduction to Allen in Chicago, from Webster, and agreed upon the terms of the sale with him December, 20, 1879, but the sale of the lots, which was to be for cash, was not completed until May 1, 1880, at which time Mr. Ladd, acting for Hews, paid the balance, \$8,000, of the purchase money. Mr. Ladd testified on the part of the plaintiffs, that he examined the title for Hews, and, in doing this, examined and read over the papers on file in this action, including the contract of sale, and that he went to plaintiffs' place of business, and there read over Allen's said letter of November 19.

Upon the trial, the court found and declared that the agreement, mentioned in plaintiffs' petition, ought to be specifically performed and carried into execution, inasmuch as defendant Hews, at the time of his purchase, did so with full knowledge of said plaintiffs' said agreement and the contents thereof, and, therefore, ordered, adjudged and decreed that the title to the land, mentioned in plaintiffs' said agreement and petition, be, and the same is, hereby divested out of defendant Hews, and vested in the plaintiffs, Smith & Keating, and it, also, further ordered and adjudged,

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the plaintiffs, Smith & Keating, to deposit with the Kansas City Savings Association the said purchase money, specifying the sum, for the use and benefit of said Hews. The real parties to the contest at the trial were Smith & Keating on the one side, and the said Hews on the other, and the court, on the facts, found the issues for the plaintiffs and gave judgment for specific execution of the contract accordingly. Believing, as we do, that the trial court properly construed the letter, and properly disposed of the case upon the evidence, and finding no error in its action or ruling, we, therefore, affirm the said judgment. All concur. Black, J., having been of counsel, did not sit in the cause.

THE STATE *ex rel.* YEOMAN, *Appellant*, v. HOSHAW.

1. **Statute of Limitations:** GUARDIAN'S BOND. The statute of limitations begins to run against the ward, from the time of the guardian's final settlement in an action on the latter's bond for failure to pay the amount found due the ward on such settlement.
2. **Guardian and Ward:** FINAL SETTLEMENT: SURETIES. The judgment for the ward against the guardian on the final settlement is conclusive on the sureties on his bond, as it is likewise conclusive for them against the ward.
3. **Parties.** Under our statute, making all contracts joint and several, a separate action may be brought against one of several heirs to charge him on the bond of his ancestor where such heir holds his portion of the estate in severalty.

Appeal from Lawrence Circuit Court.—HON. M. G. MCGREGOR, Judge.

REVERSED.

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Henry Brumback and N. Gibbs for appellant.

(1) The court erred in sustaining the demurrers and in overruling the motions for a new trial. 2 Blackstone, 243; 1 Chitty's Pleading, 52; *Barber v. Fod*, 1 Saunders, 136; *Walker v. Ellis*, 2 Munford, 88; *Rufner v. McConnell*, 14 Ill. 169; *Baker v. Hunt*, 40 Ill. 264; *Morse v. Aldrich*, 19 Pickering, 452; *Hall v. Martin*, 46 N. H. 337; *Metcalf v. Smith*, 40 Mo. 576. (2) The common law liability of the heir is recognized by the statute of our state. R. S., 1879, secs. 659, 660, 3944. The petition shows a demand which comes within that class of exceptional cases, that cannot be presented to the administrator and proved against the estate of the decedent, and which will support an action against the heir. *Sauer v. Griffin*, 69 Mo. 654; *Pres. Church v. McIlhinny*, 61 Mo. 540. (3) Nor is this action barred by the statute of limitations. "It does not appear that the accounts of the guardianship have been settled by the parties, or that any proceedings have been had before the chancellor, requiring an account of the guardian. Until the accounts are thus settled, an action cannot be sustained on the bond. A guardian must first be called to account before the surety is liable." *Stillwell v. Mills*, 19 Johnson, 304; *Salisbury v. Van Hoesen*, 3 Hill, 77; *Pratt v. McJunkin*, 4 Richardson (S. C.) 5; *Justices v. Willis*, 3 Yerger, 461; *Baily v. Rogers*, 1 Maine, 186; *Foteaux v. Le Page*, 6 Iowa, 123; *O'Brien v. Strange*, 42 Iowa, 643; *Wann v. People*, 57 Ill. 202; *Roberts v. Colvin*, 3 Grattan, 358; *Chapin v. Livermore*, 13 Gray, 561. The statute of limitations does not begin to run until the estate is held adversely by the guardian. *Norton v. Thompson*, 68 Mo. 143. (4) The judgment on the final settlement of the guardian is a judgment conclusive against the securities on his bond. *State ex rel. v. Drury*, 36 Mo. 288; *State ex rel. v. Roland*, 23 Mo. 97;

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Mitchell v. Williams, 27 Mo. 399. (5) There was no defect of parties defendant. *Metcalf v. Smith*, 40 Mo. 576; *Butler v. Lawson*, 72 Mo. 227.

John T. Teel and Phelps & Brown for respondent.

(1) The statute of limitations began to run as soon as the wards attained their majority. *Johnson v. Smith*, 27 Mo. 591; *Colman v. Willis*, 46 Mo. 236; *Ball v. Tomson*, 4 W. & S. 557; *Green v. Johnson*, 3 Gill. and John. 389; *Alston v. Alston*, 34 Ala. 29; *Taylor v. Kilgore*, 33 Ala. 221; *Davis v. Ford*, 7 Ohio, 104. The ward, on coming of age, has an action against the guardian for moneys belonging to him, remaining in the guardian's hands, without waiting for a final settlement. *State v. Rossowag*, 3 Mo. App. 11; *Flach v. Fossen*, *Ib.* 561; *State v. Harris*, 71 North Carolina, 744. And where the guardian has deceased, the ward's claim may be presented, like other claims, against the guardian's estate. *Flach v. Fassen*, 3 Mo. App. *supra*; Schouler's Domestic Relations (3 Ed.) sec. 382, p. 382. The ward's right to call his guardian to account may be barred by limitation, computed from the time he becomes competent to act. *Bones' Appeal*, 27 Pa. St. 492; *Robert v. Morrin*, 27 Mich. 306; *Railsback v. Williamson*, 88 Ill. 494. (2) The marriage of Margaret Woodrow to John Forshee, October 21, 1863, terminated the guardianship or office of Younger, and he, as such guardian, at once became liable to John Forshee and his wife for all money and property in his hands belonging to his said ward, and Forshee and his wife, or Forshee, as her husband, could maintain an action for the recovery of all accounts then due. *Parch v. Fries*, 3 C. E. Green, 204; *Bartlett v. Cowels*, 15 Gray, 445; Schouler's Domestic Relations, sec. 313 (part 4, 3 Ed.) The statute of limitations begins to run against a female infant upon her attaining majority, notwithstanding she may have previously mar-

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ried. *Watts v. Gunn*, 53 Miss. 502; *State v. Parker*, 8 Baxter (Tenn.) 495; *Cozzens v. Farmer*, 30 Ohio St. 491. Besides, coverture is a personal privilege and cannot avail a wife's assignee. (3) There is a defect of parties defendant; all the heirs should have been joined in the suit. These different suits cannot be maintained against the several heirs of Oswald Hoshaw, deceased, because they all grow out of one transaction; that is, the execution of one bond by the ancestor as surety of Younger, and the breach thereof. *Boutell v. Warne*, 62 Mo. 350; Bliss on Code Pleading, sec. 118; *Dillard v. Railroad*, 58 Mo. 69; *State v. Davis*, 35 Mo. 406; *Wagner v. Jacoby*, 26 Mo. 533. (4) The objection of defect of parties plaintiff or defendant is properly raised by demurrer or answer. Sec. 3515, R. S.; *Rengger v. Lindenberger*, 53 Mo. 364; *Dunn v. The H. & St. J. Ry. Co.*, 68 Mo. 269.

BLACK, J.—A demurrer was sustained to the petition in this case, judgment was entered thereon and plaintiff appealed. The facts disclosed by the petition are that W. H. Younger was, by the county court of Lawrence county, appointed guardian and curator of John, Ephraim and Margaret Woodrow. He gave bond conditional for the faithful performance of his duties with Oswald Hoshaw as one of his sureties. The bond was approved in February, 1854. Oswald Hoshaw, the surety, died and his estate was finally settled in the probate court before the wards arrived at the age of majority. The defendant is an heir of Oswald Hoshaw and received from his father's estate personal and real property. In 1867, Younger, as guardian, filed his final settlement in the probate court of Lawrence county, to which the wards filed exceptions, and from the judgment of that court the guardian appealed to the circuit court. The cause, on change of venue, went to the Greene circuit court, where Ephraim Woodrow obtained judgment

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against the guardian, Younger. This judgment was recovered on the nineteenth of December, 1871. Ephraim assigned the judgment to Yeoman, the plaintiff herein, in 1879, who commenced this suit on the seventeenth of December, 1881, in which he asks judgment against the defendant because of assets descended to him from the deceased surety on the bond.

1. The question presented by the demurrer is, when did the ten years' statute of limitations commence to run against the ward in a suit on the bond. If it commenced to run when the ward became of age, then this suit is barred. If not until the final adjudication on the final settlement, then this suit is not barred. There is no doubt but that the statute of limitations will begin to run in favor of an administrator and against a distributee from the date of the final settlement and order of distribution. *State v. Blackwell*, 20 Mo. 97. The same must be true as between guardian and ward. *Johnson v. Smith's Adm'r*, 27 Mo. 591, can hardly be regarded as having any bearing upon the case at bar, for there the relations of guardian and ward did not exist. The money in that case was due the moment it was received. But the respondent insists that the *State, etc., v. Willi*, 46 Mo. 236, is decisive of this one. There the guardian made settlement just after the ward became of age. The guardian died and suit was not commenced on the bond until more than ten years after the settlement. The court then said: "So it will be seen that the fiduciary relation of an administrator and guardian is not treated as a continuing and subsisting trust after the time when, by the terms of its creation, it should terminate and the proceeds of the trust be accounted for." This is certainly a correct statement of the law, and, when taken in connection with the facts of that case, is not open to objection.

But it is further insisted that, by making the quotation from *Greene v. Johnson*, 3 Gill & John. 389, the

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doctrine was announced that the statute commenced to run the moment the ward became of age. What was then said must be taken in connection with the facts of that case. It is true the statute declares that every guardian or curator shall continue in office, unless sooner discharged, until the ward shall arrive at full age. Then for many, and indeed for most, purposes the relation does cease, but not for all purposes. When that time arrives the guardian is required by law to make an exhibit of his accounts and file the same with the probate court. This exhibit must remain on file for at least three months. He must also give the prescribed notice of his intention to apply for a discharge. The ward may then appear and contest the correctness of the accounts and review the entire accounts of the guardian. It then becomes the duty of the guardian to pay over the balance found due to the ward. The bond stands as security that the guardian will do all of these things, and that, too, after his majority, *i. e.*, file the account, give the notice, and pay the balance found due as ordered by the probate court. If the guardian should fail to file the accounts within the time fixed by law, the ward might bring suit on the bond and assign the breach with sufficient breadth to call for a full statement of the accounts. But the ward may not sue on the bond the day after he arrives at full age, for the guardian has the right to settle his accounts with the probate court and he has the prescribed time in which to make the same, give notice, etc., and so long as he proceeds within the appointed time there is no breach of the bond and there can be no suit on it in the circuit court. Now, in this case, the settlement was made. This suit is not for a failure to make final settlement, nor for a failure on the part of the guardian to perform any antecedent duty. The breach and only breach assigned is a failure to pay the amount of the final settlement allowed against the guardian. When did that breach arise, and, conse-

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quently, the cause of action accrue? Manifestly, when the amount to be paid was ascertained and not before. That judgment is conclusive against the sureties. For them it is conclusive against the ward. He can recover no more.

2. Another objection assigned by the demurrer is that there is a defect of parties defendant. The petition alleges that the property described therein descended to the defendant as heir of the surety on the bond. It also shows that there were other heirs, but that the real estate has been partitioned and the defendant holds his portion in severalty. In 2 Tuck. Com. 111, in considering the action of a debt, it is said: "This action, we have seen, lies against the heir upon the bond of the ancestor when the heir is expressly bound therein and hath assets by descent. It is considered the heirs own debt in respect of the assets and he is, therefore, chargeable in the debt and detinent." 1 Chitt. Plead. (16 Am. Ed.) 124. He is not chargeable further than he received assets. 4 Bac. Abr., Heir & Ancestor, F. If he sets forth the assets, which he has, the judgment is special, to be recovered of the land descended. *Id.* H. At common law it was necessary to sue all the heirs jointly. 2 Tuck. Com. 111; 1 Chitt. Plead. (16 Am. Ed.) 61. It appears to be made necessary so to do by statute in New York. Barbour on Parties, 136. But as all contracts are, by our law, joint and several, and the defendant holds his portion of the estate descended in severalty, we see no reason why he may not be sued without joining the other heirs.

The judgment is reversed and the cause remanded. All concur, except Sherwood, J., who did not sit in the hearing of the case.

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SIEGRIST et al. v. ARNOT, Appellant.

1. **Negligence :** CARELESS DRIVING, WHEN OWNER OF CARRIAGE NOT RESPONSIBLE. One who gets into the carriage of another without his consent or knowledge, and is injured by the careless driving of the latter, while so ignorant of his presence in the carriage, cannot recover for the injury.
2. ——— : PERSON IN DANGER. Where a person is placed in peril by the carelessness of another who owes him a duty of safely carrying him, the propriety of an attempt to escape a reasonably apprehended danger is not to be determined by what a person of ordinary care and prudence would have done under the circumstances.

Appeal from St. Louis Court of Appeals.

REVERSED.

Fisher & Rowell for appellants.

(1) "The liabilities of a common carrier do not apply to those who let horses and carriages for hire." Cooley on Torts, 638. (2) "A common carrier is one who regularly undertakes, for hire, to carry goods and passengers between different places, for such as may offer." Cooley on Torts, 638. (3) The defendant's contract to loan his carriages was a gratuitous bailment, and subject only to such liability as the law prescribes for that kind of a contract. A gratuitous bailor is held only for gross negligence, which is the omission of care, which even the most inattentive and thoughtless never fail to take of their own concerns. *Gray v. M. R. P. Co.*, 64 Mo. 49; *Lygo v. Newbold*, 9 Ex. 302; Wharton on Negligence, sec. 430; *Gartside v. Proprietor*, 4 T. R. 581; *Lamb v. Western Railroad*, 7 Allen 98; *Carr v. Boston & L. Railroad*, 14 Allen 448; *Harper v. Hartford & N. H. Railroad*, 37 Conn. 272; Story on Bailments, secs. 6, 374, 390. If one loan a horse to another,

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the borrower becomes a gratuitous bailee. 37 Ill. 250; *Lobenstein v. Preckett*, 8 Kas. 213. The borrower must use the property as agreed upon, and there is no liability if he does not so use it. Story on Bailments, secs 227, 232, 234-5, 396, 413; *McCarty v. Young*, 6 H. & M.; *Horne v. Meakin*, 115 Mass. 326. This case is high authority to the effect that even if the bailment is for hire, no one but the party hiring it can recover damages. A father claimed to hire a horse and vehicle for his son to attend a funeral with his wife, the latter being injured by the horse running away. There was evidence that the horse was a fractious animal. The defendant claimed that the horse was let to the father. The court held that if the horse was let to the father and used by the son, there could be no recovery. *Lygo v. Newbold*, 9 Ex. 302, was a case where a party got upon a conveyance by permission of defendant's servant, and was injured, and the court held that getting upon the vehicle without authority precluded a recovery; that the party ought to have known she had no right to be there. (4) "There can be no contract to transport safely, where there is no contract at all." *Norton v. Western Railroad*, 15 N. Y. 449; *Shearman & Redfield on Negligence*, sec. 264. If a person has no lawful right to be on a vehicle, he cannot recover damages, except for gross negligence, after the latter has notice of the person's presence. *Id.* The defendant's instruction is sustained by *Fink v. Potter*, 17 Ill. 406; *Ingalls v. Bliss*, 9 Met. 1. (5) There was no error in excluding the rebuttal evidence of Mrs. Siegrist. No proper foundation was laid for contradiction of Mrs. Garneau. Her attention was not called to a definite time and place, nor was the testimony material, for the defendant was not liable for what Mrs. Garneau did with her carriages.

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E. B. Sherzer for respondent.

(1) The instructions asked by defendant should have been given. *Minter v. Railway*, 41 Mo. 503; Story on Agency, sec. 452; *Garretzen v. Duenczel*, 50 Mo. 104; *Higgins v. Waterliet Road*, 46 N. Y. 23; Cooley on Torts, 143, 539; *Willen v. Ry.*, 107 Mass. 107; *Jacobus v. Ry.*, 20 Minn. 125; *Steamboat v. King*, 16 How. (U. S.) 474.

(2) Defendant's instructions should not have been given. If plaintiff leaped from the carriage in order to escape some impending danger, to which the negligence of defendant's servants exposed her, defendant, as author of the original peril, is answerable, provided the danger in remaining is apparently as great as that to be encountered in jumping out. *Nelson v. Ry.*, 68 Mo. 595; *Schultz v. Ry.*, 44 Wis. 638. The instructions given by the court of its own motion were inapt and misleading; such epithet, "gross," is "inapt and misleading." *Harper v. Railroad*, 44 Mo. 488, 491; *Lockwood v. Railroad*, 17 Wallace, 357, 371, 382, 383; Bigelow on Torts, 266; *Milwaukee Road v. Arms*, 91 U. S. 489, 494, 495; *McPheeters v. Railroad*, 45 Mo. 22, 26; *Lemon v. Chanslor*, 68 Mo. 340, 357, 358.

HENRY, C. J.—This is an action by plaintiff for damages for an injury to Mrs. Siegrist, which she sustained by being thrown from a carriage of defendant, in the city of St. Louis. Defendant had a judgment in the circuit court, which was reversed by the court of appeals, and it is now here on appeal from the latter judgment.

Defendant was a livery stable keeper, and gratuitously furnished four of his carriages, and a driver for each, to carry to and from Mercantile Library Hall some young ladies and gentlemen who were to take part in a performance there for the benefit of orphans. It was

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distinctly agreed between the defendant and Mrs. Garneau, who, with Miss Hopkins, managed the entertainment, that the carriages were for the use of the ladies and gentlemen who took parts in the tableaux, and that Mrs. Garneau was to furnish to defendant the names of the parties to be carried in his vehicles, so arranging them as to make the least travel for each carriage. This was furnished, and in one of defendant's carriages Miss Wickham, Miss Garrison and Miss Barney were taken to the hall, the driver calling at the residence of each of these ladies for them, neither of them directing him whom he should go for. The testimony is uncontradicted that the names of persons to go in his carriages were furnished to defendant, and the fact equally well established that the driver of this particular carriage went for those three ladies who did perform on the occasion, corroborates the testimony of defendant, that each of his drivers had a list of the names of the persons who were to be carried in the carriage driven by him.

After the entertainment Mrs. Siegrist, who had taken no part in the performance, but whose daughter had, got into the carriage, she says, by direction of Mr. Garneau, son of Mrs. Joseph Garneau, who had made the arrangement with defendant, and soon after the three young ladies who had gone there together got into the carriage in which Mrs. Siegrist had taken her seat. Young Garneau was stationed there to seat performers in the carriage. There is not a particle of evidence tending to prove that the driver knew that Mrs. Siegrist was in the carriage; she says she did not see him, or speak with him. He was at his place on the box, outside, when she took her seat. It was eleven o'clock at night. He had reason to suppose that he would carry those home who had gone to the hall in his carriage. After letting the three young ladies out of the carriage, the last one at Judge Wickham's door, his horses took

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fright and ran, and Mrs. Siegrist was thrown from the carriage and the driver from his seat. It is a significant fact, that when on the ground, stunned by the fall, he said, answering a question, that there was no one in the carriage, and this tends strongly to prove that it was the same carriage in which the young ladies above named had gone to the hall, and that the driver did not know that Mrs. Siegrist was in his carriage. Her young son had ridden from the hall on the box with the driver, but had got down at Judge Wickham's, and there is no evidence tending to prove that the driver knew that he was Mrs. Siegrist's son, or who he was.

Mrs. Siegrist had no arrangement with Mr. Arnot, or his driver, or with Mrs. Garneau, to ride in Arnot's carriage. Neither Arnot nor his driver knew that she had taken a seat in the carriage, and she must have known that she had no right to a seat in it. On these facts, what is the law?

The court declared it to be as follows: "The jury are instructed that if they believe from the evidence that the carriage was furnished gratuitously by the defendant under an agreement with him that it was to be used only in the conveyance to and from the library of persons who were to perform in the tableaux mentioned in the evidence, and if they further believe that the plaintiff, Mrs. Siegrist, was not one of such performers, and that she entered said carriage without the knowledge or consent of the defendant, then the defendant is not liable for any injuries she may have sustained while being driven in said carriage, even though the driver of said vehicle had undertaken to drive her to her home, unless the jury shall further find that such injuries were occasioned by gross carelessness on the part of the defendant. And in order to find the defendant liable on account of such carelessness, the jury must believe from the evidence that at the time of the accident the driver of said vehicle was so intoxicated as to be unfit

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to manage the team entrusted to him, and that this fact was known to the defendant and not known to said plaintiff, or that the habits of said driver, either as to drunkenness or carelessness, were such as to render him an unsafe or unfit person to be placed in charge of a vehicle, and that such habits were known to the defendant at the time; and further, that the injuries received by the said plaintiff were occasioned by the drunkenness or carelessness of said driver."

Defendant was not a common carrier. He was under no obligation to carry any one that night except those for whom the carriage was engaged, and is certainly not to be held to a stricter liability than that declared in the instruction. If neither Arnot nor his driver knew that Mrs. Siegrist had taken a seat in the carriage, upon what principle is Arnot to be held liable? There were no contract relations betwixt himself and Mrs. Siegrist, no legal requirement that he should carry her. She knew she had no right there, and stands in some respects, so far as Arnot is concerned, as one to a railroad company, who, without right, and without the knowledge of the employes of the company, gets upon its train and is injured; the only difference being, in Arnot's favor, that he is not, while the railroad corporation is, a common carrier.

If one gets into the vehicle of another, without his knowledge or consent, and is by careless driving of the latter injured, is it possible that the latter would be liable to him for damages, however gross the negligence is? How is the case at bar to be distinguished from the case supposed? If Arnot had been driving, he would not have been liable to Mrs. Siegrist for negligent driving, if ignorant that she had taken a seat in his carriage. We think that the instruction given by the court was as favorable to plaintiffs as they had a right to ask, even more favorable than the facts warranted.

Of plaintiffs' refused instructions, one of them as-

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serted the liability of one who, whether a common carrier or not, undertakes to carry another, and another declared that the ownership of the carriage and the employment of the driver constituted the latter the servant of Arnot, who was answerable for negligence committed by him, within the scope of his employment. As abstract propositions of law they are correct, but have no application to the facts of this case, because there was no evidence that Arnot, or his driver, agreed to carry Mrs. Siegrist, or knew that she had taken a seat in the carriage. Another refused instruction declared Arnot liable if young Garneau seated Mrs. Siegrist in the carriage. Mr. Garneau did not represent either Arnot or the driver, and had no authority from any one to give her a seat in Arnot's carriage, nor did he inform the driver when he seated Mrs. Siegrist that it was she, and not one of the young ladies he had carried to the hall. The others of plaintiffs' refused instructions predicated the right of Mrs. Siegrist to recover, one upon the fact that she entered the carriage in good faith, believing that she had a right to be carried home in it, and was not notified by defendant or his driver, or any one for him, that the carriage was for the use of those only who had taken part in the performance. Another declared defendant liable if no objection was made by defendant or his driver to her riding in the carriage. Another declared that the permission of defendant or the driver, for plaintiff to ride, might be found from the acts and silent acquiescence of defendant or his agent.

The objection to these instructions, and all the others not heretofore mentioned, which contain the same vice, is that they submitted questions to the jury not warranted by the evidence. There was no testimony having a tendency to prove that Arnot, or his driver, consented that Mrs. Siegrist should ride in the carriage, or knew that she had taken a seat in it. Nor were any facts proved which gave her any grounds to believe that

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she had a right to be driven home in that carriage. She had not gone in one of Arnot's carriages to the hall, she had taken no part in the performance. Her daughter neither went to or from the hall in this carriage. Mrs. Siegrist's name was not on the list of those given to Arnot, and by him to the driver, to be carried in his carriage; and, as far as the record shows, she has no more grounds than any other lady at the hall as a spectator to suppose that she had the right to a seat in the carriage. As to the acquiescence of the defendant or the driver in her taking a seat in the carriage, it is sufficient to say that one will not be held to have acquiesced in that of the existence of which he was utterly ignorant. If, from the evidence, the jury had found that either Arnot or his driver consented that Mrs. Siegrist should ride in the carriage, or knew that she had taken a seat in it, it would have been the duty of the court to set aside such finding as wholly unwarranted by the testimony, and it would, therefore, have been error to submit such a question in instructions.

The second instruction given at defendant's instance is erroneous as an abstract proposition of law:

"The court instructs the jury that if they believe, from the evidence and circumstances in this case, that Mrs. Siegrist jumped or got out of the carriage in question, and was injured in consequence of doing so, and that she would not have been injured if she had remained in the carriage, and that a person of ordinary prudence and care would have remained in said carriage at the time she jumped out, or got out, then plaintiff cannot recover in this case."

In the first place, there was no evidence tending to prove that Mrs. Siegrist jumped from the carriage, and, in the second place, if she was in the carriage with the consent of Arnot or the driver, and had jumped from the carriage, it would not have precluded a recovery. If

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one is placed in peril by the recklessness or carelessness of another who owes him a duty of safely carrying him, the propriety of an attempt to escape a reasonably apprehended danger is not to be determined by what a person of ordinary prudence and care would have done under the circumstances. But Mrs. Siegrist, having taken a seat in this carriage, without the knowledge or consent of defendant or his driver, or Mrs. Garneau, and having no right to ride in the carriage, whether she jumped out of it or was thrown from it is immaterial, so far as concerns this controversy.

In support of the general propositions herein announced, we refer to Wood on Master and Servant, sec. 279; *Snyder v. Ry. Co.*, 60 Mo. 413; *Flower v. Penn. Ry. Co.*, 69 Pa. St. 210; *Satterlee v. Groat*, 1 Wend. 272.

The judgment of the court of appeals is reversed, and that of the circuit court affirmed. The constitutional amendment, establishing the Kansas City court of appeals, having taken from the St. Louis court of appeals jurisdiction of this case, the mandate of this court will go to the St. Louis circuit court, in which the cause originated. All concur, except Black, J., who dissents.

BLACK, J., DISSENTING.—The instructions, as a whole, given in this case, assume that Mrs. Siegrist was rightfully in the carriage. They improperly use the word "gross," but as they hypothecate the facts upon which the plaintiff may recover, that may be overlooked. They require of the defendant only ordinary care and prudence, and he is made liable only in the event that he furnished a drunken or incompetent driver, knowing him to be such. Although the furnishing of the carriage was wholly a matter of gratuity, they go quite to the verge of the law in the defendant's favor, as I understand it to be written. The opinion of the court just filed goes much further than do these instructions upon

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which the cause was tried, and holds, as a matter of law, upon all the evidence, that she was a trespasser, a wrong-doer, and while in the carriage outside of and beyond the pale of ordinary care; in short, that the defendant owed no duty whatever to her. To all this I cannot and do not agree, but dissent therefrom.

BUSE V. RUSSELL *et al.*, *Appellants*.

1. **Land Title: ACCRETIONS.** Where the intermediate space between a survey on the main land of the Missouri river and a surveyed island at the times of the surveys consisted of a slough, and since then the slough has so filled up as to connect the island and the main land and to make them one continuous tract of land, the adjacent owners of the island and the survey are entitled to the accretions to their respective lands, but if the slough simply filled up from the bottom, or by deposits within its bed, and the accretions did not form on the one side or the other, then the center of the slough as it was before the water left it is the boundary between the survey and the island.
2. **Accretions.** Where the shore lines of two tracts of land, divided by a water course, receive accretions until they come together, the line of contact will then be the division line.
3. ———. If the slough gradually filled up as the water receded, the same principle is applied and the new land belongs to the riparian owner from whose shore the water receded, and it is immaterial whether the water was navigable in the common law sense or general acceptance of the term, or was a non-navigable stream.
4. **Land Title: ISLAND: ALLUVION.** If the island was washed away, in whole or in part, after it was surveyed and then reformed on the same bed, the owner of it, as it was before it was so washed, would be entitled to it, but if it was washed away and the land sought to be recovered was made by deposits to and against the survey of the main land, then such deposits became the property of the owner of the survey.

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5. **Verdict.** A verdict for plaintiff in ejectment is sufficiently definite in its description of the premises, if the boundary lines as fixed by the verdict can be traced thereon.
6. **Practice in Supreme Court.** Excess in the amount of a judgment may be obviated by a *remittitur* in the Supreme Court.

Appeal from Franklin Circuit Court.—HON. A. J.
SEAY, Judge.

AFFIRMED.

Crews & Booth for appellants.

(1) The third instruction given by the court for plaintiff was erroneous. There was no evidence tending to show that said arm of the river or slough simply filled from the bottom without forming accretions on either side. The words "simply filled up from the bottom or by deposits within the bed of the slough," as used in said instruction, were calculated to lead the jury to suppose that all land formed within the original limits of the slough and resting on that bottom were to be divided equally between the island and survey. (2) Plaintiff's fourth instruction was also erroneous. There was no evidence tending to show that Island Seventy-three did wash entirely away or that an island reformed on the bed of the river where an island once existed. (3) The court erred in giving the fifth instruction asked by plaintiff; because the technical term "accretions," as used there, was not explained in that or any other instruction. The jury was left to determine for itself, what, within the meaning of that instruction, would be accretions to Island Seventy-three, and what to said survey. (4) The verdict is insufficient to support a judgment. It is merely a finding for plaintiff "to the center of the first depression next to survey 1922." This does not conform to the pleadings. (5) The verdict was against the evidence. (6) The court erred in rendering

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judgment for plaintiff for recovery of all the land lying to the north of the railroad, when the verdict did not find for plaintiff as to all of said lands, and there was no evidence of any pretense of right in plaintiff to about fifteen acres of said land, lying between said railroad and the original river line of survey 1922. The judgment was in excess of both verdict and evidence.

L. F. Parker for respondent.

The instructions given for plaintiff are strictly in accordance with the law governing the rights of owners of lands along the Missouri River, as laid down in *Benson v. Morrow et al.*, 61 Mo. 345. The term accretion, which is criticized at such great length by counsel for defendants, is the very word used in the instructions approved in that case. And an instruction giving the technical definition of that term was condemned. The giving of the instruction asked by defendants, though erroneous in being too favorable to them, is not an error of which they can complain. The point that the judgment includes a small strip of land between the railroad and the slough, or first depression, which strip the evidence tends to show may belong to survey number 1922, has no merit, as this error, if error it was, has been cured by a *remittitur* in this court. That such a course is the proper remedy, see *McQuiddy v. Ware*, 67 Mo. 64.

BLACK, J.—This was ejectment for Island Seventy-three in the Missouri river. The island was surveyed and numbered when the public lands were surveyed. It was patented to the state as swamp land, and by the state to the county of Franklin, and by the latter sold to plaintiff. The plat of the public surveys, certified from the surveyor general's office, shows that the island was, at the date of the survey, located near the left bank of the Missouri river. This is one of a number of islands,

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surveyed and unsurveyed, in the same locality. The main channel of the river, it would seem, is, and always has been, to the north and east of these islands. On the main land nearest to the island, is located survey 1922. Between this island and the survey, the plat shows an arm of the river, or slough as it is called. At the present time and since 1868, or thereabouts, the island and survey have been connected by land. In going from the old survey to the present river bank, there are two depressions in the soil. The first begins with well defined banks, at or near the old river line of the survey, and is several yards in width. Then passing over higher land the next depression is reached, and again higher land to the river bank. The first of these depressions is clearly the place of the old slough. The form of the island is easily traceable by the survey.

The court, at the request of the plaintiff, gave the following instructions:

"3. If the jury believe from the evidence that a slough, or arm of the Missouri river run between Island Seventy-three and survey 1922, at the time of making the United States survey, and that since that time the same has been filled up so as to connect the island with the main land, and make the island and survey one continuous tract of land, then the adjacent owners of Island Seventy-three and survey 1922, are entitled to the accretions to their respective lands, but if the slough simply filled up from the bottom, or by deposits within the bed of said slough, and said accretions did not form on the one side or the other, then the center of the slough as it was before the water deserted it, is the boundary between said survey and said island."

"4. That although the jury may believe that Island Seventy-three, section six, township forty-four, range one, west, at any time washed away entirely, or in part, after the same was surveyed and patented by the United States government, yet if they further find that the land

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in controversy is a reformation of said island on the bed of the river where such island formerly existed, then plaintiff is entitled to recover in this action, if it be shown that the defendant unlawfully detained the same."

"5. The court instructs the jury that if they believe from the evidence that the land and premises described in plaintiff's petition, and of which the defendants were in possession at the time of the institution of this suit were, and are not within the boundary line of survey 1922, nor are any part thereof, nor are any accretion thereto, but that they are within the original boundary line of Island Seventy-three, in Missouri river and the accretions thereto, and that defendants held and hold the possession wrongfully from the plaintiff, then they will find for the plaintiff."

At the request of the defendant, the court instructed the jury as follows:

"The court instructs the jury that if they find from the evidence in this cause, that Island Number Seventy-three was washed away by the waters of the Missouri river, and that the land claimed by plaintiff as Island Number Seventy-three, is land made by deposits of the said river against and to survey 1922, then they must find the issues in this cause for the defendants."

The jury found for the plaintiff, and fixed the boundary line between the parties at the center of the first depression next to survey 1922.

1. The defendants first contend there is no evidence upon which to base the third instruction. They offered evidence to the effect that in 1855 steamboats occasionally ran through the slough; that there was a strong current in it from 1857 to 1864, which continuously cut away the island, and land or sand-bars formed, from the survey towards the river, until, in 1865, the whole island had been thus washed away, and the new formations of land took its place. One witness lived upon the land

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from 1869 to 1876, during which time a part of it was cleared. Other witnesses say a part of the island, called a tow head, always remained.

Plaintiff introduced evidence to the effect, that, prior to the flood of 1844, the island was covered with timber, which was cut off about that date; that the channel of the slough thus filled up so that no steamboats ran through it after that date; that the slough was then no more than fifty or sixty yards wide, and gradually filled up to dry land; and that stumps were found on the island in 1876, of considerable size, in their natural place in the earth. The jurors had a right to take into consideration all these physical evidences, as well as the bare assertion of the witnesses. There was not only sufficient evidence upon which to base the instruction, but it is difficult to see how the jury could do otherwise than find the facts hypothecated for the plaintiff.

From the plat, survey 1922 appears to have been bounded by the river. It being thus bounded, under the well settled law, both the survey and the island became entitled to the alluvion, or deposits made to the banks, and the respective owners of the island and survey acquired the title to such new-made land by accretion, as incident to their ownership of the main land so bounded on the river. *Smith v. Schools*, 30 Mo. 280; *Schools v. Risley's Heirs*, 40 Mo. 356; *Benson v. Morrow et al.*, 61 Mo. 345. It must follow that if the shore lines of two bodies of land, divided by a water course, receive accretions until they come together, the line of contact will be the division line. If, however, the slough gradually filled up, as the waters receded therefrom, the same principle is applied, and the land belongs to the riparian owner from whose shore the water receded, and for this purpose it makes no difference whether the water was navigable in the common law sense, or the general acceptance of the expression, or was a non-navigable stream. *Benson v. Morrow et al.*, 61 Mo. 345; *Warren*

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v. Chambers, 25 Ark. 120; 2 Black, 261. We see no error in this instruction.

2. The further contention is, that the fourth instruction given on the prayer of plaintiff, and the one given at the request of the defendants, are inconsistent. If we bring them together, we find they assert these propositions, viz: If the island washed away, in whole or in part, after it was surveyed, and then reformed on the same bed, plaintiff is entitled to recover; but if it washed away and the land in dispute was made by deposits to, and against the survey, then such deposits became the property of the defendants. It is perfectly clear that the two states of facts are entirely different and involve different propositions of law, for if the island disappeared and then reformed again on the same bed, it could not in any sense be regarded as accretion to the survey, but if it was washed away, and accretions to the survey, or deposits against the same, continued from time to time, until the former location of the island was covered therewith, then arose the state of facts alone, upon which the defendants acquired any right to the land in dispute. The defendants cannot complain of the instruction given at their request, for it was a most liberal statement of the law in their favor.

It is true, the plaintiff must recover on the strength of his own title, and that he must show title to the land in question. The instructions must be read in the light of the cause as it stood before the jury on all the evidence. What might be the law if the island had washed away wholly, so as to become a part of the navigable portion of the river, and so remained for any considerable length of time, we are not called upon to determine by any of the facts in this case, nor do the instructions hypothecate any such state of facts. It cannot be claimed, by any fair intendment, from the evidence, that any considerable portion of the island proper ever became a part of the navigable channel of the river, or

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that the island ever became wholly extinct. The most that can be said, or inferred in this behalf, is, that after the flood of 1844, and during a period of years, the island was from time to time covered with sloughs, so that in process of time the whole was under water, different portions of it, however, first here and then there, remaining above the surface of the water.

Plaintiff produced his title papers and identified the location of his grant. The defendant can defeat the recovery only by showing that there was, at all times, a well defined channel and body of water next to the survey, and that the new formed land was by way of accretions to the bank of the survey. This they have failed to do with favorable instructions.

3. The claim that the judgment was excessive has been obviated by the *remittitur* entered in this court. Nor is there any merit in the point that the verdict is indefinite. The boundary lines fixed by the verdict, can be easily enough ascertained on the ground.

The judgment of the circuit court is affirmed. All concur.

INGLE V. MUDD, *Appellant*.

1. **Replevin : INSTRUCTIONS.** A series of instructions, in an action for the recovery of specific personal property, approved.
2. **Practice : FINDING OF JURY.** Where the instructions properly present the matters in issue to the jury, their verdict must be regarded as final.

Appeal from Bates Circuit Court. — HON. JAMES B. GANTT, Judge.

AFFIRMED.

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The court gave the following instructions on behalf of the plaintiff:

"1. The record in this cause shows that the possession of the property was in Mudd at the time the proceedings were instituted, and cannot be contradicted."

"2. The court instructs the jury, that, although they may believe that there was a verbal sale, absolute in its terms, of the property to Mudd, by Ingle, and a delivery of it to Mudd, with a condition or understanding between them that Ingle should have his team back upon complying with the conditions of the agreement, then such sale is simply a pledge of the property to secure the indebtedness, and the ownership of the property is, and was, all the time, in plaintiff, subject to the payment of the indebtedness existing between them, for the security of which the property was delivered to Mudd."

"3. The court instructs the jury, that, if they believe from the evidence that plaintiff borrowed the sum of one hundred dollars from defendant, and pledged his team to defendant, as security therefor, with the agreement that if said money was paid at the time defendant should come to Rich Hill to attend the Shelt-Mudd trial, plaintiff was to pay nothing for expenses incurred by Mudd in keeping said team; but if said money was not paid at said time, then plaintiff was to pay the sum of twelve dollars per month for keeping the same; and, if the jury should believe from the evidence that said one hundred dollars was tendered to defendant while he was at Rich Hill, for the purpose of attending the Shelt-Mudd trial, and defendant refused said sum, then they will find for the plaintiff, and if you find for the plaintiff you will assess the damages plaintiff has sustained, according to the evidence, by reason of its detention since the time the tender was made, if any, and for any injuries thereto, if any are shown by the evidence, and

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you will also find the value of said property, and state it in your verdict."

"4. If the jury find from the evidence that it was a part of the contract between plaintiff and defendant, that plaintiff should refund to defendant any expenses he might incur in taking care of the team, yet, if the jury find the plaintiff tendered, either by himself, or by his agent, the one hundred dollars to the defendant, or the defendant's attorney, while at Rich Hill attending the Shelt-Mudd trial, about the seventh of January, 1881, and defendant refused to accept it, and made no objections to the character of the money tendered, or to the time of the tender, and did not object because the expenses incurred had not been paid, and were not tendered, then such tender was good, and if defendant claimed any expenses it was his duty to name it, and the want of a tender of such an unsettled claim will not defeat plaintiff's right to possession, but if the jury find that defendant did claim his expenses, and refused on that account to accept the one hundred dollars, and that plaintiff declined to pay any more, then said tender was not good, if they believe the contract was to cover said expenses also."

The court gave the following instructions at the request of the defendant:

"5. This is an action commenced by the plaintiff to recover the possession of the property in dispute, and the burden of proof rests upon the plaintiff, and before he can recover in this action, he must show to the satisfaction of the jury by a preponderance of the testimony, that at the time of the commencement of this action he had either a general or special property in, and a right to the exclusive and immediate possession thereof. If the plaintiff has failed to show this the finding should be for the defendant."

"6. If the jury believe from the evidence that the plaintiff let the defendant have the possession of said

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property to secure the payment of one hundred dollars, and it was then and there agreed that the plaintiff, by repaying to the defendant the said sum, and all expenses attending the keeping of said property, might, within thirty days from the time said property was placed in the possession of the defendant, reclaim said property, and the plaintiff did not, within the said thirty days, either pay to the defendant, or tender the said one hundred dollars, and tender, or offer to pay, the expenses aforesaid to the defendant, or refused to pay said expenses, then the plaintiff cannot recover in this action, and the finding should be for the defendant."

"7. If the jury believe from the evidence that the plaintiff, before he was entitled to recover said property, was to pay to the defendant the sum of one hundred dollars, and the expenses of keeping the same, and the defendant demanded the payment of said expenses, and the plaintiff refused to pay the same within the time agreed upon, then the jury should find for the defendant."

"8. The plaintiff, before the commencement of this action, should have demanded of the defendant the return of the possession of said property, and if no such demand has been proved by the evidence, the plaintiff cannot recover."

C. C. Bassett and John T. Smith for appellant.

The court erred in refusing instructions numbers one and two asked by defendant. *Dilworth v. McKeloy*, 30 Mo. 149; *Boutell v. Warne*, 62 Mo. 350. The court also erred in refusing the third instruction asked by the defendant. The court erred in giving instruction number four for the plaintiff. It is inconsistent with the third given for the plaintiff. It improperly declares the law with reference to the tender of the amount due. *Kitchen v. Clark*, 1 Mo. App. 430.

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Parkinson & Abernathy for respondent.

The third and fourth instructions given for plaintiff are not at all inconsistent. It is not necessary that the jury should have left to them facts as to which there was no controversy on the trial. *Newcomb v. Blakely*, 1 Mo. App. 289. The law of tender is correctly stated. *Downing v. Platte*, 8 Cent. Law J., 283. But defendant could not have been injured by the instruction on that subject, and is in no situation to complain. *Gray v. Mo. River Packet Co.*, 64 Mo. 47. The instructions taken together fairly present the law of the case, and the judgment will not be reversed because some of them are thought to be technically incorrect. *Henschen v. O'Bannon*, 56 Mo. 289. Instruction number two, asked by defendant, was properly refused. The court cannot instruct on an issue not made by the pleadings. *Hassett v. Rust*, 64 Mo. 325; *Bank v. Armstrong*, 62 Mo. 59; *Bank v. Muddock*, 62 Mo. 70.

SHERWOOD, J.—Action for the recovery of specific personal property, formerly designated replevin. The suit grew out of a loan by defendant of one hundred dollars, on December 23, 1880, the money to be paid at the Shelt-Mudd trial, which was to occur, and did take place, January 6, 1881. The team of horses, etc., were given to Mudd as security for the loan, interest being deducted, and the only material controversy as to what the contract was, is on the points whether the plaintiff was simply to repay the one hundred dollars to Mudd at the Shelt-Mudd trial, and then receive his team; and, if not paid at that time, to repay that sum as well as expenses of the horses' keep, rated at twelve dollars per month, from the time of that trial; the team to be redeemed, in any event, within thirty days from the time the loan was effected.

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The testimony offered on the part of the plaintiff fully supports this view of the contract, while that adduced by the defendant only differed from it in two particulars: (1) That the expense of the keep of the horses was to begin from the date of the loan. (2) That the money was to be paid to Mudd *on the day* of the Shelt-Mudd trial at Rich Hill, *i. e.*, on the sixth day of January, 1881, and if the money and expenses were not paid on that day, then Mudd was to take the team, etc., home with him, to be returned to plaintiff, if, within the thirty days, the sum loaned and expenses should be paid. This, as I believe, is a succinct statement of the contract between plaintiff and defendant, and the differences between them as to what their precise contract was.

It is entirely immaterial, in this case, whether the contract be termed a conditional sale, or a pledge, the instructions given, as well on behalf of the plaintiff as on behalf of the defendant, fully presented the matters in issue to the jury, and their verdict must be regarded as final.

Therefore, judgment affirmed. All concur.

STEPHENS V. THE HANNIBAL & ST. JOSEPH RAILROAD
COMPANY, *Appellant*.

1. **Negligence : RAILROAD : SPEED OF TRAINS.** A railroad has the right to run its trains in excess of the usual rate of speed to make up lost time, but, in doing so, those in charge of the train should use greater vigilance and care to prevent accidents to workmen on the track.
2. — : — : —. Where an employe on the track is injured

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by a train so running at an unusual rate of speed, he cannot recover in the absence of evidence to show that the engineer did discover, or, by the exercise of care, could have discovered the plaintiff in time to have checked the train.

3. **Vice-principal.** Where the master appoints an agent with a superintending control over his work and with power to employ and discharge hands, and to direct and control their movements in and about their work, such agent is a vice-principal and his negligence is that of the master.
4. **Master and Servant : ORDER OF MASTER INVOLVING EXTRA HAZARD TO SERVANT.** Where the master gives an order to a servant to do an act at a time, or under circumstances which render the doing of the act, extra hazardous, and the servant in obeying the order receives an injury, the master is liable, unless to obey the order was plainly to imperil life or limb.

Appeal from Clay Circuit Court.—HON. G. W. DUNN,
Judge.

REVERSED.

Geo. W. Easley for appellant.

(1) The objection to the introduction of any evidence under the first count should have been sustained. The plaintiff and the train men were fellow servants, and the plaintiff could not recover for the negligence of his fellow servants. *Rohback v. Pacific Ry. Co.*, 43 Mo. 187; *McGowan v. St. Louis, etc., Railroad*, 61 Mo. 528; *Blessing v. St. Louis, K. C., etc., Railroad*, 77 Mo. 410. Not only the evidence, but the pleadings must negative the presumption that all engaged in the same service are fellow servants. *Summerbays v. Railroad Co.*, 2 Col. 484; s. c., 20 Am. Ry. Rep. 362; *Dow v. Ry. Co.*, 8 Kan. 642; s. c., 5 Am. Ry. Rep. 401. (2) The second count did not state facts sufficient to constitute a cause of action, and this question was raised by the motion in arrest. Plaintiff and the foreman, Rice, were fellow servants, and without an allegation of negligence in the hiring or retention of Rice, no cause of action was

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stated. *McDermott v. H. & St. Jo. Ry. Co.*, 73 Mo. 516; *Wood's Master and Servant*, 900; *Fort v. Pacific Railroad*, 2 Dillon, 259; *Smith's Master and Servant* (3 Eng. Ed.) 216. (3) The first instruction given for the plaintiff was erroneous. *Rohback v. Railroad*, 43 Mo. 187. The second instruction was likewise erroneous. *Wood on Master and Servant*, 900; *Smith's Master and Servant* (3 Eng. Ed.) 216. The instruction ignores the defence of contributory negligence. *Gibson v. Jackson Horse Ry. Co.*, 76 Mo. 282. It enlarges the issues made by the pleadings. *Waldhier v. Railroad Co.*, 71 Mo. 514. (4) Defendant's first, second and third instructions should have been given. The plaintiff could not recover without showing all those instructions required, and, further, that the negligent character of the engineer or Rice was unknown to plaintiff. *Wood on Master and Servant*, p. 791, sec. 414; *Devitt v. Railroad*, 50 Mo. 302. (5) Defendant's fourth instruction should have been given. The jury may have found negligence from the single act of Rice, which is not the law. *Whar. on Neg.*, sec. 238; *Lee v. Bridge Works*, 62 Mo. 565. Defendant's fifth instruction should have been given. If plaintiff stood still and let the train run over him he could not recover. Defendant's seventh instruction was clearly right. The foreman and plaintiff both being negligent, plaintiff could not recover. *Schabb v. Wheel Co.*, 56 Mo. 173. (6) The third instruction given for the plaintiff and the general finding on the counts are erroneous, and the motion in arrest should have been sustained for that reason. *Mooney v. Kennett*, 19 Mo. 551; *Clark's Adm'r v. H. & St. Jo. Ry. Co.*, 36 Mo. 215; *Pitts v. Fugate*, 41 Mo. 405; *State ex rel. Collins v. Dulle et al.*, 45 Mo. 269. The two counts were for separate and distinct causes of action. But if there is one entire cause of action, and one good count in the declaration, a general verdict and general assessment of damages will answer. *Clemens v. Collins*, 14 Mo. 604; *Brownell v. Pacific Railroad*, 47

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Mo. 243; Bliss on Code Pl., sec. 113; Pomeroy on Remedies, p. 489, sec. 455.

Henry Smith for respondent.

(1) Plaintiff was entitled to recover on the first count of the petition. He was not a fellow servant of the train men. He was engaged in repairing the track, they in running the cars. It was defendant's duty to see that plaintiff, while at its work in one department, was not injured by its chosen servants in another department. *Kieley v. Belcher, etc.*, 2 Cent. L. J. 705; *Baird v. Pettit*, 70 Pa. St. 482; *Lewis v. Ry.*, 59 Mo. 495; *Hali v. Ry.*, 74 Mo. 298; *Long v. Ry.*, 65 Mo. 225; *Chicago Ry. v. Moranda*, 98 Ill. 302. The injury was the result of carelessly running and operating the train, at least, that was for the jury to determine from the evidence. *Schultz v. Ry.*, 44 Wis. 638; *Haines v. Ry.*, 3 Cold. 222. Plaintiff was not guilty of contributory negligence. *Cottrel v. Ry.*, 47 Wis. 634. (2) Plaintiff was entitled to recover on second count of the petition. He was not a fellow servant of foreman Rice. The latter was representing the company as to the management and control of the work. Shearman & Redf. on Negligence, sec. 102; Wharton on Negligence, sec. 222; Wood on Master and Servant, 886; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Brothers v. Cartter*, 52 Mo. 372; *Lewis v. Iron Mt. Ry. Co.*, 59 Mo. 495; *Marshall v. Shrickler*, 63 Mo. 308; *McGowan v. Iron Mt. Railroad*, 61 Mo. 528-532; *Cook v. H. & St. Jo. Ry.*, 63 Mo. 397; *Dowling v. Gerard B. Allen & Co.*, 74 Mo. 13, 18, 19, 20. (3) Plaintiff was subject to extra hazard and greater risk than belonged to his employment in obeying Rice's order to remove the obstructing stones. Rice, in giving the order, represented the company. *Dowling v. Allen & Co.*, 74 Mo. 13; *Keegan v. Kavanaugh*, 62 Mo. 230; *Railway Co. v. Fost*, 17 Wall. 553, 557; *Chicago & N. Ry. Co. v. Bay-*

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field, 37 Mich. 205; *Lalar v. Ry. Co.*, 52 Ill. 401; *Ry. Co. v. Collins*, 2 Duv. 114. (4) It was not contributory negligence in plaintiff to obey Rice's order. *Keegan v. Kavanaugh*, 62 Mo. 230. The fact that an employe is directed by his superior in charge to do an act at a time and under circumstances that a person would reasonably apprehend danger, would not justify his disobedience of such orders, and obedience is not negligence. *Frandsen v. Ry. Co.*, 36 Iowa, 372; *Patterson v. Ry. Co.*, 76 Pa. St. 389; *LeClair v. Ry. Co.*, 20 Minn. 9. If the master, or another servant, standing toward the injured servant in the relation of vice-principal, orders the servant into a place of danger, and he obeys and is injured, the law will not charge him with contributory negligence. *Miller v. Ry. Co.*, 12 Fed. Rep. 600; *Miller v. Ry. Co.*, 17 Fed. Rep. 67.

BLACK, J.—This was a suit for personal damages sustained by the plaintiff while in the employ of the defendant, as track repairer. The first count of the petition attributes the injuries to the negligent manner of running a passenger train, and the second to the negligence of Rice, the foreman. Plaintiff was one of a gang of six laborers under Rice, their foreman. At the time of the accident, the men were at a curve in the road ballasting the track, which they did by breaking large stones distributed along the track for that purpose.

The plaintiff's account of the matter is as follows: "When we saw the train coming, Rice said, 'clear the track.' We all got off the track. When I said to Rice: 'Jack, there are two stones on the track,' he said, 'it is time you were getting them off.' I heard the train some time before I saw it. When I first saw the train it was about one hundred and fifty yards away. I can't say how far it was away when I first heard it. The train was coming about twice as fast as usual. When the train came

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in sight, Rice said, 'clear the track.' After we got off the track, I said to Rice: 'there are two stones on the track,' and he said, 'it is time you were getting them off.' It took me all the time to get those rocks off between the time the order was given and I was hurt. The engine hit the tamping bar which I had been using, but which I did not then have in my hand, and that struck me and turned around and the engine struck my left arm, crushing it. The tamping bar struck my right arm, turning me around and throwing me against the engine. I was standing clear of the track, with my right side to the approaching train. My back was not to it."

The two stones referred to were some six inches in diameter and eighteen inches long. The evidence further shows that the train was behind time a few minutes, and was running faster than usual to make up time, and that the track at that place was new and in good repair. Rice says when he first heard the train he thought it was on another road, but he soon knew, and before he saw it, that it was on their track, and he ordered the men to get off. He also says, when he made the remark to Stephens, his attention was called to some engineers who were on the track with a hand car, and that he ran towards them waving his hat for them to get off, and did not see Stephens again, until just as he was struck; that he hallooed, but Stephens did not hear him.

1. The court, at the request of the plaintiff, gave an instruction to the effect that if the injuries complained of were caused by the negligence of the employes on the train, in running it at a high and dangerous rate of speed, and without fault on the part of the plaintiff, then the finding should be for the plaintiff. There was no evidence in the case on which to base this instruction. The defendant had a right to run its trains in excess of the usual rate of speed to make up lost time. Of course, in doing this, it became the duty of the employes in charge of the train to use greater vigilance and care to

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prevent accidents on the track. But there is no evidence in the case showing, or tending to show, that the engineer did, or by the exercise of care, could have discovered the plaintiff in time to have checked or stopped the train. The section men themselves could not see the train until it was well near to them. The verdict is general. It does not show upon which count the finding was based. Both counts seek to recover for the same injury, it is true, but they are based upon entirely distinct grounds, and we cannot say the finding was not upon the erroneous instruction. This branch of the case should have been entirely withdrawn from the jury.

2. It follows from what has been said, that the second instruction asked by the defendant was properly refused, and the second, given by the court of its own motion, should not have been given. There is no charge of negligence on the part of defendant in employing Rice or in retaining him in its service. Nor is there any evidence tending, in the least, to show that Rice was an incompetent person to discharge the duties of foreman when employed, or that he became incompetent after his employment, and with knowledge of such incompetency the defendant retained him in its service. The third and fourth instructions asked by the defendant, so far as they relate to the incompetency of Rice, are foreign to any issue presented by the pleadings or evidence and were properly refused. For a like reason the third given by the court of its own motion should not have been given.

3. The court, at the request of plaintiff, gave the following instruction:

"2. If the jury believe from the evidence that the giving the order by the foreman to remove the stone, under the circumstances of the case, and after the train had approached so near, was negligence in the foreman and caused the injury, or, if the jury believe the injury resulted from the negligent or careless control, or man-

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agement of the work by the foreman, they will find for plaintiff on the second count."

And of its own motion the following :

"1. The plaintiff, in becoming the employe of the defendant, undertook to incur the risk of injuries ordinarily incident to the employment in which he engaged, and the defendant is not responsible for such injuries. If the section foreman, under whom the plaintiff was working, recklessly ordered the plaintiff to do an act that was extra hazardous, and the plaintiff, in obeying said order, was injured by the defendant, the defendant is responsible for such injury, unless the plaintiff, by the exercise of due care on his part, could have avoided the injury."

And upon the same subject the court, at the request of the defendant, gave the following :

"3½. If the jury believe from the evidence that plaintiff was himself guilty of any negligent or reckless act which directly contributed to the injury sued for, they will find for defendant."

A demurrer to the evidence was also overruled. The first contention over these instructions is, that Rice and the plaintiff were fellow servants, and, there being no negligence alleged or proved in the hiring or retention of Rice, there can be no recovery. *McDermott v. H. & St. J. Ry. Co.*, 73 Mo. 517, cited by counsel for appellant, has no direct bearing upon the question here presented. It was there alleged that Dawson was incompetent to perform the duties assigned to him, and that the company had knowledge of that fact before the injuries complained of occurred, and with such knowledge retained him in its service, and by reason of which the plaintiff was injured. The question there considered was as to the competency of certain evidence to show the alleged incompetency of Dawson and knowledge thereof by the company. No such question is raised in this case. It

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does not follow that plaintiff and Rice were fellow servants, because Rice was also a servant to the defendant. The law is well settled in this state and many others, that where the master appoints an agent with a superintending control over the work, and with power to employ and discharge hands and direct and control their movements in and about the work, the agent, in respect of such matters, stands in the place of the master. His negligence is the negligence of the principal, and for which the latter is liable. *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Brothers v. Cartter et al.*, 52 Mo. 372; *Dowling v. Allen & Co.*, 74 Mo. 13; *Cook v. H. & St. Jo. Ry. Co.*, 63 Mo. 397; *Shearman & Redfield on Neg.*, sec. 102; *Wharton on Law of Neg.*, sec. 222.

Here the facts are uncontroverted. Rice, as foreman, had power to and did employ and discharge the men. They were under his directions, and subject to his orders, and it is said in the evidence, and not controverted, that they were subject to the orders of no one else. Beyond all doubt Rice was a vice-principal, and not a fellow servant with plaintiff, in respect to all orders and directions given by Rice to the men in the discharge of their duties.

The point that no order was given by the foreman is clearly untenable. Rice ordered the men to get off the track, which they did, when plaintiff, having regard for his master's business, called Rice's attention to the two stones, whereupon Rice said to him: "it is time you were getting them off." What could or would any employe regard this, but a direction to take the stones off? It may be, as stated in *Wood on Master and Servant*, page 900, that "an order given by a foreman to do an act within the line of the servant's duty, in the execution of which an injury arises, is not such an act of authority, on the part of the foreman, as renders the master liable for the consequences," but if the order is given to do an

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act at a time or under circumstances which renders the doing of the act extra hazardous, the rule, as stated, can have no application. The principal is liable, unless to obey the order was plainly to imperil life or limb. Obedience is the primary duty of the servant, and he may, within reasonable bounds, trust to the superior judgment of the master.

So far as negligence on the part of the plaintiff was concerned, that was fairly submitted to the jury by the first instruction given by the court of its own motion, and the one given at the request of defendant. The case, upon the evidence, would seem to be confined to the simple issues, as to whether or not, under all the circumstances, it was an act of negligence and carelessness on the part of the foreman to direct the plaintiff to remove the stones, and in obeying the order he was injured, because of such negligence, and without fault on his part. There does not appear to be any evidence of negligence in the general management of the work. The latter part of the plaintiff's second instruction was probably not designed to submit any question of general negligence, but it is well enough to make it plain in this respect. The other instructions prayed for by the defendant, and refused by the court, were properly refused.

The judgment is reversed, and the cause remanded for new trial. Henry, C. J., concurs in the result. Sherwood, J., is of the opinion that the case should be simply reversed and not remanded. The other judges concur.

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THE STATE *ex rel.* DOPKINS, *Public Administrator,*
Plaintiff in Error, v. HITCHCOCK *et al.*

Practice in Supreme Court. The Supreme Court will only review the record proper in a cause, where it fails to appear that any exceptions were taken to the action of the trial court in overruling the motions for new trial and in arrest of judgment.

Error to Harrison Circuit Court.—HON. S. A. RICHARDSON, Judge.

AFFIRMED.

D. S. Alvord for plaintiff in error.

D. G. Heaston for defendant in error.

NORTON, J.—This cause is before us on writ of error prosecuted by plaintiff from a judgment of the Harrison county circuit court, rendered in favor of defendants. The record fails to show that any exceptions were taken to the action of the court in overruling the motions in arrest of judgment and for new trial, and finding no error in the record proper, the judgment is affirmed. • *St. Joseph v. Ensworth*, 65 Mo. 628. All concur.

Marks v. Hardy.

MARKS V. HARDY, *Appellant.*

1. **Corporation: STOCKHOLDER: ABATEMENT.** A proceeding by motion under Revised Statutes, section 736, to subject a stockholder to execution on a judgment against the corporation to the extent of the unpaid balance of his stock, does not abate on the death of the stockholder.
2. **Motion Against Stockholder for Unpaid Stock Subscription: DEATH OF STOCKHOLDER.** While such execution cannot issue against the estate of the deceased stockholder on the final adjudication on the motion, yet such adjudication may be regarded as a demand against the estate, and be classed as such.
3. ———: **RETURN OF NULLA BONA.** If the officer having the execution against the corporation makes a part of the debt and returns the writ *nulla bona* as to the residue, a sufficient foundation is laid to proceed, under the statute, against the stockholder for such residue.
4. ———: **SHERIFF'S RETURN TO EXECUTION AGAINST CORPORATION.** It is not necessary, in order that the stockholder may be proceeded against, that the sheriff's return to the execution against the corporation should negative the ownership of all property whatever by it. A fair and substantial *nulla bona* return is all that is required.
5. **Execution, Return of: PRESUMPTION.** A return of a sheriff to an execution will be presumed to have been deposited with the clerk of the court on the return day, in the absence of anything to the contrary in such return or on the writ.
6. ———: ———. When the law fixes a day for the return of an execution, such return should not be made before that day.
7. ———: ———: **PRIORITY.** The creditor of a corporation can gain no priority by filing his motion for execution against a stockholder before the return day of the execution against the corporation.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

H. I. D'Arcy for appellant.

A return is essential to the creation of any right

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based on an execution against a stockholder. Courts will not dispense with any statutory formality, even when they deem it unimportant. *Bright v. Boyd*, 1 Story C. C. 486; *Townsend v. Tallant*, 33 Cal. 45; *Bree v. Bree*, 51 Ill. 367; *Abernathy v. Dennis*, 49 Mo. 468; *Merrill v. Walker*, 24 Me. 240; *Shroyer v. Nickoll*, 55 Mo. 500; *Turner v. Ry. Co.*, 78 Mo. 580; Sedgwick on Construction (Ed. Pomeroy) 277. And what is obviously implied is as much a part of a statute as what is expressed. *Neenan v. Smith*, 50 Mo. 526; *Wilkinson v. Leland*, 2 Pet. 627; *Cooksey v. Railroad*, 74 Mo. 480; *United States v. Kirby*, 7 Wall. 482; *Suckley v. Furse*, 15 Johns. (N. Y.) 338; *Oates v. National Bank*, 100 U. S. 244; Lieber's Hermeneutics (Ed. Hammond) 81. And the necessity of a return arises from general principles as well as from the statute. The statutory motion cannot be resorted to if a single dollar can be levied on. *Hannah v. Bank*, 67 Mo. 685.

Rassieur & Tiffany for respondent.

(1) The statute does not require any particular kind of evidence "that there cannot be found any property or effects whereon to levy." R. S., sec. 736. A judgment and execution unsatisfied are evidence of insolvency, and of inability to collect. They are, however, evidence only, and the fact may be established as well by other evidence. *Terry v. Tubman*, 92 U. S. 161; *Hodges v. Silver, etc.*, 9 Oregon, 20; 2 Am. Lead. Cases, 134, 136; *Skrainka v. Allen*, 76 Mo. 384. (2) When an officer has made one full examination for goods without success, he can return the execution *nulla bona* before return day. *Thornton v. Lane*, 11 Ga. 523; *Wilcox v. Ratcliff*, 5 Blackbird, 561; Crocker on Sheriffs, secs. 424, 422. (3) The proceeding is supplementary, and has not all the attributes of an independent suit. *Allen v. Benton*, 79 Mo. 166. (4) Those who were stockholders at the time execution

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issued against the company, became liable, unless the execution against the company were satisfied. *McClaren v. Franciscus*, 43 Mo. 465. Though the court, and not the sheriff is to determine whether or not the execution shall go against the stockholder, "the rule of liability remains the same." *Skrainka v. Allen*, 76 Mo. 384. As soon as the court, in place of the sheriff, ascertains that there is no property on which to levy, it may order execution. (5) It was the object of the statute to make the court the judge of whether there was any property of the corporation on which to levy, instead of the sheriff, and to give the stockholder an opportunity to show corporate property, if there were any, and the court rightly exercised its discretion. *Skrainka v. Allen*, 76 Mo. 348. (6) The statute says, "and there cannot be found any property or effects whereon to levy the same." The evident meaning is any substantial amount whereon to levy a substantial satisfaction of such execution. *Ilfracombe Ry. Co. v. Poltimore*, 3 C. P. L. R. 286, 293.

BLACK, J.—1. The plaintiff having a judgment and unsatisfied execution issued thereon against the Butchers' and Drovers' Bank, made his motion under section 736, for execution against Hardy on account of an unpaid balance of sixty shares of stock held by the latter. Execution was awarded, and this order was affirmed by the court of appeals. Pending the appeal in this court, Hardy died. The administrator of Hardy's estate resists the revivor, and this presents the first question for decision.

Express statute law is that execution shall not issue upon a judgment or decree rendered against the intestate in his lifetime, which judgment or decree constitutes a demand against the estate within the meaning of the administration law. R. S., sec. 2360. No formal judgment for money is entered under section 736, but the order is that execution issue against the stockholder for

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the unpaid balance on his stock. The argument is that the order for execution does not constitute a judgment, decree, or demand, which may be presented and classed as a demand against the estate, and as no execution can be issued against a dead man's estate, the proceeding must abate. It may be contended with just as much force that the order for execution is not such a judgment or decree as may be classed as a demand, and as the statute, with respect to executions, prohibits an execution from issuing only on such judgments and decrees as constitute a demand against the estate within the meaning of the administration law, that, therefore, executions may still go out in this class of cases against the property of the estate.

The substance and policy of the law must not be overlooked. It is true no formal judgment or decree is entered on the motion, but the inquiry upon the hearing of the motion involves a determination of whether the party is a stockholder, and, if so, to what extent, and how much he owes thereon. It may also require an adjudication as to off-sets which he may have. The result is to fix upon him a liability for the unpaid balance found to be due on the stock. This balance due to the corporation is, by the order and law, appropriated to the payment of the judgment debt, and the payment discharges the stockholder and his estate from further liability. Of course the proceeding on the motion is not an original suit. It is, however, a supplementary proceeding, and for many purposes must be regarded and treated as an action pending. It would be against the policy of the law to hold that this proceeding must abate by the death of the defendant. The order for execution is designed to take the place of a more cumbersome suit, which would result in a decree. While execution may not go out against the estate, we think the final adjudication on the motion may fairly be regarded and treated as a demand against the estate, and may be classed as such, and we

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so rule; and, further, the proceeding does not abate when commenced against the stockholder in his lifetime, by reason of his death thereafter.

2. There were many questions raised on the hearing of the motion in the circuit court, two of which only appear to be urged here, and they are stated as follows: (1) "The plaintiff below could not proceed, by motion, against the defendant stockholders before a return that there could not be found any property or effects whereon to levy the same." (2) "The evidence, which consisted solely of the sheriff's return, showed that there was property, and that it had been levied on by him under the execution."

The facts, so far as they bear upon these questions, are that the execution against the bank was issued on the sixth of January, 1881, returnable to the following February term of the circuit court. The sheriff's endorsements on the writ show that on the seventh of January he levied upon one safe and contents, office furniture, etc., and "a lot of books and papers." Some of the property was sold on the twenty-sixth of that month for \$121.26, and the proceeds applied to costs. Other articles of the property levied upon, including what would appear to be nearly, if not all, of the contents of the safe, were delivered to claimants, and the balance was delivered to a receiver, as per order of the court. Pulitzer was summoned, as garnishee, on the fourteenth of January. He owed the bank, it is conceded, \$395.44, and had property out of which that amount could have been made, but the plaintiff released him. There is an endorsement of "no other goods, chattels, or real estate found," etc., on the writ, but without date. Also, a statement in connection with the service of garnishment on Pulitzer of "no goods, chattels," etc.

The statute is: "If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then

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such execution may be issued against any of the stockholders to the extent of the amount of unpaid balance of such stock by him or her owned." But the execution can only issue upon an order of court made upon motion after notice. This statute should be regarded as remedial. Still, it is a summary proceeding, and the conditions upon which the executions may issue against the stockholder must be reasonably and fairly complied with. The execution must not only be issued, but it must take the course of the law in respect of such writs. It must appear, also, that there cannot be found property of the defendant whereon to levy the same. If the officer make a part of the debt and return the writ *nulla bona*, as to the residue, that lays a sufficient foundation to proceed against the stockholder for the balance. So far as the Pulitzer garnishment is concerned, and between these parties, and on this motion, the execution against the bank must be regarded as satisfied to the extent of the amount conceded to be due from him to the bank. Still there remains more than seven thousand dollars due on the execution, and the balance due on Hardy's stock is less than three thousand dollars.

While the return shows that all the property levied upon and not sold or delivered up to claimants, was turned over to a receiver, there is no evidence whatever of its value, nor is there anything in the record to show how or in what proceeding the receiver was appointed. Besides, there is the *nulla bona* return of the sheriff, and the express finding of the court, that no property of the defendant corporation could be found, out of which to make the debt. It is not necessary that the return should negative the existence of any property whatever, a single dollar, as is contended. This return, in the absence of any further showing, will be regarded as a fair and substantial *nulla bona* return. Both parties stand upon it as it is, without asking to have it made more definite and without effort

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to impeach it in any respect, and we must hold the objections made to be without merit.

Incidental to these questions it has been urged that the return was premature, and on the other hand it seems to be contended that the return of the writ may be made by the officer before the return day. The answer to all this is that it does not appear, from anything in the return, or any endorsement on the writ, when it was in fact lodged with the clerk, and the presumption, therefore, is that the execution was deposited with the clerk on the return day, and not before, and we so take the fact to be, for all the purposes of this case. It may not be amiss to say that the law fixes a time when an execution shall be returned, *i. e.*, to the next succeeding term of the court, unless otherwise directed, and then it is made returnable to the second succeeding term. R. S., sec. 2338. It was held in New York that a creditor's bill could not be filed until after the return day of the *feri facias*, and a premature return was of no particular avail to the creditor. *Cassidy v. Meacham*, 3 Paige, 311; *Williams v. Hogeboom*, 8 Paige, 469; *Platt v. Caldwell*, 9 Paige, 386. Subsequent decisions of that state would, at first, seem to hold otherwise, but it is believed they are made to turn upon the then existing statute, which, it was ruled, allowed the officer to return the execution at any time within sixty days. *Livingston v. Cleveland*, 5 How. Pr. R. 396; *Renaud v. O'Brien*, 35 N. Y. 99.

Authorities may be found to support the plaintiff's view in this case, but the better doctrine is that when the execution by law has a fixed return day, it should not be returned before that day. *Schermerhorn v. Connor*, 41 Mich. 376; *Adams v. Cumiskey*, 4 Cush. 420; *Roberts v. Knight*, 48 Me. 171. This is in accord with prior rulings of this court, from which we are not disposed to depart. *Dillon v. Rash*, 27 Mo. 243. To give sanction to any other practice is to disregard the forms and substance of the law and lead to unnecessary complications

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in the strife of creditors to acquire a priority. The creditor can gain no priority by prematurely filing his motion.

The cause is revived in the name of the administrator and affirmed. All concur.

THE STATE *ex rel.* THE DONNELL MANUFACTURING
COMPANY, v. McGRATH, *Secretary of State.*

1. **Corporation: INCREASE OF CAPITAL STOCK, NOTICE OF: STATUTE.**
The certified copy of the statement of proceedings relative to the increase of the capital stock of a corporation, required by Revised Statutes, section 939, to be filed in the office of the secretary of state, must show the newspaper publication of the notice of the proposed increase of stock, as required by Revised Statutes, section 938, and if such certificate fails to show such fact, the secretary of state has no authority to issue his certificate that the corporation has complied with the law made and provided for the increase of stock, and the amount to which said stock is increased.
2. ———: ———. The weekly newspaper notice, required by Revised Statutes, section 938, of the proposed increase of the capital stock of a corporation, was intended for the public at large, while the written, or printed notices, required by said section to be sent to each stockholder, are for the benefit of the stockholders.

Mandamus.

WRIT DENIED.

Smith & Krauthoff for relator.

(1) The certificate filed by the relator in the respondent's office, and the petition (the truth of which stands admitted), allege that due notice was given of the proposed increase of stock. In the absence of proof to

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the contrary, the presumption is that the law was complied with in this respect. *Chouteau Insurance Co. v. Holmes*, 8 Allen, 217; *Cone v. Cullen*, 13 Pa. St. 133; *Leavitt v. Mining Co.*, 4 Am. & Eng. Corp. Cases, 234, 237. (2) All the stockholders having attended the meeting, and voted for the increase of stock, it is not necessary that a newspaper notice should have been published. *Rex v. Theodorick*, 8 East, 543; *Rex v. Chetwynd*, 7 B. & C. 695; *Field on Corp.* 228; *Angell & Ames on Corp.* (11 Ed.) sec. 495; *People v. Peck*, 11 Wend. 604; *Jones v. Turnpike Co.*, 7 Ind. 547; *Samuel v. Halladay*, 1 Woolworth C. C. 400; *Stebbins v. Merritt*, 10 Cush. 27; *Chamberlain v. Railroad*, 15 Ohio St. 225; *Judah v. Insurance Co.*, 4 Ind. 333; *Bank v. Silk Co.*, 3 Met. 288; *Glass Co. v. Dewey*, 16 Mass. 94. (3) It is not necessary that the notice be published to advise the public of the proposed increase of stock, none but stockholders have the right to vote. Neither the public nor its representatives have the right to be present even at the meeting. *Gray v. Portland Bank*, 3 Mass. 364; *Angell & Ames on Corp.* (11 Ed.) 554; *Chouteau v. Allen*, 70 Mo. 290; *Eidman v. Bowman*, 58 Ill. 444.

M. K. McGrath pro se.

(1) The constitution of 1875 very wisely contains a provision (article XII., section 8) not found in the constitution of other states to prevent the watering of stock. To carry out the provision of the constitution, the general assembly passed the act of May 24, 1879. (2) The cases referred to by the relator's counsel cannot be authority in this case. They were decided before the constitution of 1875 was adopted, and under statutory enactments different from those in this case.

NORTON, J.—This is a proceeding by mandamus, instituted by relator, a business and manufacturing corpo-

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ration, to compel defendant to issue a certificate to relator, that said corporation has complied with the law made and provided for the increase of its capital stock, and stating the amount to which said capital stock is increased. The respondent entered his appearance, waived the issuance of an alternative writ, and, treating the petition as the alternative writ, filed his return thereto, which is in the nature of a demurrer.

The position taken by respondent is, that he ought not to be compelled to issue the certificate demanded of him, for the reason that the certified copy of the statement of proceedings required to be filed in his office by section 939, Revised Statutes, does not show a compliance with the law providing for the increase of its capital stock, and that in the absence of such a showing, he has no authority to certify to a fact, of the truth of which such certified copy furnishes no evidence.

It is provided by section 8, article XII. of the constitution, that * * * "the stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting called for that purpose, first giving sixty days' public notice as may be provided by law." In pursuance of this constitutional provision, the general assembly has provided, in sections 938 and 939, Revised Statutes, as follows:

"Section 938. Whenever any corporation shall desire to call a meeting of the stockholders for the purpose of availing itself of the privileges and provisions of this article, or for increasing the amount of its capital stock, * * * it shall be the duty of the directors to publish a notice, signed by at least a majority of them, in a newspaper in the county, * * * at least sixty days, and to deposit a written or printed copy thereof in the postoffice, postage prepaid, addressed to each stock-

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holder at his usual place of residence, at least sixty days previous to the day fixed upon for holding such meeting, specifying the object of the meeting, the time and place, where and when such meeting shall be held, and the amount to which it shall be extended or changed. * * * The notice provided for in this section shall be published at least once a week, and the first publication must be at least sixty days before the day of such meeting."

Section 939, after providing for the organization of such meeting, and the manner of proceeding thereat, then provides that, "a statement of the proceedings, showing a compliance with the provisions of this article, the amount of capital actually paid in, * * * the whole amount of assets and liabilities, and the amount to which the capital stock shall be increased, shall be made out and signed, and verified by the affidavit of the chairman, and countersigned by the secretary; and such statement shall be acknowledged by the chairman and recorded, * * * and a certified copy of such recorded instrument shall be filed in the office of the secretary of state, who shall thereupon issue a certificate that such corporation has complied with the law made and provided for the increase of stock, * * * and the amount to which such capital stock is increased."

It will be perceived that the duty of the secretary of state to issue such a certificate as this proceeding seeks to compel him to issue, is predicated upon the filing in his office of a certified copy of the recorded proceedings of the corporation, showing a compliance with the provisions of the law, authorizing an increase of its stock, and the sole question in this case is whether the paper filed in the office of the secretary of state shows that the law has been complied with. We are of the opinion that it does not show such compliance, unless it can be held that the following statements contained, and in the copy filed in respondent's office, shows compliance. They are as follows: "Notice of the meeting and the purpose

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thereof having been duly given and received by said stockholders, all of the stockholders being present and having signed a written consent thereto on the record of such meeting, did, by their unanimous vote, consent and agree that the capital stock of said company, which is now thirty thousand dollars, should be forthwith, and by their said vote, increased fifty thousand dollars, so as to make the total authorized capital stock of said company eighty thousand dollars."

It is argued with much plausibility by counsel that the only object in giving a notice of such meeting is to notify the stockholders and secure their attendance, and that, inasmuch as the copy filed in the office of respondent shows that the notice given to the stockholders had the effect of securing the attendance of all of them, who unanimously consented to and voted for the increase of stock, that it, therefore, follows that the constitution and laws were complied with, and that it was the plain duty of respondent to issue the certificate called for. If notice of a meeting, given to the stockholders, is the only notice required to be given under the constitution and laws of the state, the conclusion arrived at by the argument of counsel would be correct. The fault of the argument, however, lies in the assumption that notice to the stockholders is all that was intended to be given, which is taking for granted the question in dispute. The constitution prohibits a corporation from increasing its capital stock except, first, in pursuance of a general law; second, with the consent of the persons holding the larger amount in value of the stock first obtained at a meeting held for that purpose, first giving sixty days' public notice as may be provided by law. It is contended that the sixty days' public notice referred to was only intended for the benefit of the stockholders, and not for the public. If that was the only object, the framers of the constitution were unfortunate in the selection of words. If such were the sole purposes, why was such a notice required to be

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a public notice if the public had no interest in it? If such were the only object, instead of saying: "First giving sixty days' public notice," why was it not said first giving sixty days' notice to the stockholders.

We think the framers of the constitution, by the use of the language employed, meant something more than counsel for relator contends, in view of the very line of authorities to which we have been cited by counsel tending to establish the proposition, that when notice is required to be given to stockholders of a corporate meeting, either by the charter of the company or the general law, and all the stockholders assemble in such a meeting, that the business transacted thereat, if within the scope of their corporate powers, is binding on the corporation, even though no notice of such meeting had been in fact given to the stockholders. In view of these authorities and the then prevalent practice of watering the stock of corporations, resulting oftentimes to the injury of the public, provided that no increase of the capital stock of a corporation should be made until a sixty days' public notice should be given of the meeting to be held for that purpose. This interpretation was put upon the said constitutional provision by the first legislature which convened after the adoption of the constitution by the enactment of section 938, Revised Statutes, in which provision is made not only for a public notice by a weekly publication in a newspaper, the first publication to be at least sixty days before the day of the meeting, but provision is also made that a written or printed copy of such notice shall be deposited in the postoffice, postage prepaid, addressed to each stockholder at his usual place of residence, at least sixty days previous to the day fixed upon for holding the meeting.

We can reach no other conclusion than that the weekly publication to be made in the newspaper was intended for the public at large, and that the written or printed copies of the notice required to be sent to each

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stockholder was for the benefit of the stockholders, and inasmuch as the certified copy filed with the secretary of state did not show a compliance with the law in this, that it failed to show that public notice was given as required, and inasmuch as the duty of issuing the certificate demanded of respondent is only devolved upon him when a certified copy of the proceedings showing a compliance with the law is filed in his office, the demurrer will be sustained, the writ denied, and petition dismissed. All the judges concur.

THE STATE V. COLLINS, *Appellant*.

1. **The record** in this case held to correctly show all proper orders between a first and second trial of the cause, and that the indictment was signed by the prosecuting attorney.
2. **Practice, Criminal: JURORS, PANEL OF.** The fact that in a trial for murder, a panel of forty qualified jurors was procured on the sixth, when the cause was not to be tried until the tenth, constitutes no error, as the defendant or his counsel could have re-examined them on the tenth, if he had so desired, to ascertain whether any of them had become disqualified between the dates mentioned.
3. —: **SEPARATION OF JURY.** The temporary separation of a juror from his fellows, the juror being under the charge of an officer while the others remained locked in their room, and nothing being said to such juror about the trial, constitutes no ground for a reversal of the judgment.
4. —: **JURORS: OBJECTION TO PANEL AFTER VERDICT.** It is too late after verdict to object to the panel of jurors, or to the manner of its selection.
5. —: **INSTRUCTIONS.** An instruction for murder in the second degree is properly refused where the evidence shows the offence to be murder in the first degree, or nothing.

Appeal from Pike Circuit Court.—HON. ELIJAH ROBINSON, Judge.

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AFFIRMED.

Clark & Tapley and Forrist & Fry for appellant.

(1) The record proper does not show that any orders were made by the court, between the first and second trials, and fails to show that the indictment was signed by the prosecuting attorney. (2) The court erred in procuring a panel of forty qualified jurors on the sixth of March, when the trial was set for the tenth of March. The whole forty may have pre-judged the case between these dates. The case being set for the tenth, all process was returnable on that day. R. S., secs. 1903, 1904, 1906, 1907, 3722. (3) It was error to overrule appellant's motion to continue the cause. R. S., sec. 1848; Const. of Mo., art. 2, sec. 22; *State v. Hickman*, 75 Mo. 419, *et seq.* (4) The court erred in its definition of deliberation and in failing to define the term provocation. *State v. Kolovsky*, 74 Mo. 249, and cases cited. (5) The court erred in not giving an instruction for murder in the second degree, and in regard to the law of self-defence. (6) The cause should be reversed because of the separation of the jury. The statute is peremptory and itself stands for a reason. R. S., sec. 1907; *State v. Collins*, 81 Mo. 652.

B. G. Boone, Attorney General, for the state.

(1) The indictment is sufficient. Whar. on Hom. (2 Ed.) sec. 791; *State v. Steeley*, 65 Mo. 218; *State v. Ward*, 74 Mo. 253. (2) The remarks made by counsel for the state are not open to objection, unless the prosecutor misstates the law, or the facts, in his address to the jury, or takes some undue advantage of the accused, his conduct will not be reviewed by this court. *State v. Hopper*, 71 Mo. 433; *State v. Stark*, 72 Mo. 37; *State v. Hoffman*, 78 Mo. 256. (3) Defendant was not prejudiced by the action of the court in overruling his motion

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for continuance. His witnesses were brought in by attachment and were present when their testimony was wanted. *State v. Ward*, 74 Mo. 253, and cases cited; *State v. Fox*, 79 Mo. 109. (4) There was no evidence to support an instruction for murder in the second degree, and it should not have been given. *State v. Hopper*, 71 Mo. 425; *State v. Talbot*, 73 Mo. 347. (5) Defendant's objection to the constitution of the trial jury came too late after verdict. *State v. Jones*, 61 Mo. 232; *State v. Ward*, 74 Mo. 256, and cases cited. Statutes in respect to the impanneling of jurors, in criminal cases, are directory. *State v. Knight*, 61 Mo, 373; *State v. Ward*, *supra*. (6) To hold that such separations of the jury, as occurred in this case, warrant a reversal of the judgment, would render the trial of capital cases in this state practically impossible. *State v. Bell*, 70 Mo. 633, and cases cited. (7) The jurors mentioned in defendant's twentieth objection were not disqualified. Sec. 1897, R. S., 1879; *State v. Walton*, 74 Mo. 270; *State v. Burgess*, 76 Mo. 234.

NORTON, J.—The defendant was indicted in the circuit court of Pike county, at its September term, 1883, for murder in the first degree, in killing Owen Utterback. He was put upon his trial at the March term, 1884, of said court, resulting in his conviction of the crime as charged. This judgment, on defendant's appeal to this court, was reversed, and the cause was remanded, and defendant being again put upon his trial, at the March term, 1885, of said court, he was again convicted of murder in the first degree, and the cause is before us, the second time, on defendant's appeal.

It is objected that the record proper does not show that any orders were made by the court between the first and second trials, and that it fails to show that the indictment was signed by the prosecuting attorney. This objection is not well taken; the record shows that the indictment was returned into court by the grand jury,

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at its September term, 1883, and that it is signed by Edward T. Smith, prosecuting attorney; it further shows that the court convened on the second day of March, 1885, and that the trial of defendant was commenced on the tenth day of said month, and was adjourned, from day to day, till the twelfth day of said month, when the jury returned their verdict.

It appears, from the record, that the court began its session on the second day of March, 1885, and that this cause was placed on the docket for Tuesday, the tenth of March, to which time the subpoenas for the witnesses were returnable; that a *venire* for a jury was ordered, returnable on Friday, the sixth of March, at which time the persons summoned were examined, touching their qualifications as jurors, and forty persons were found by the court qualified to serve as jurors, a list of whom was furnished to defendant, on Saturday morning, the seventh; that on the tenth of March, the day the cause was docketed for trial, the said jurors appeared in court, and the state, as well as defendant, proceeded to make their peremptory challenges, neither the state nor defendant, nor his counsel, expressing any desire to make any further examination of said jurors. It is insisted that the action of the court was erroneous, in procuring a panel of forty qualified jurors, on the sixth of March, when the cause could not be tried till the tenth, inasmuch as the jurors, who might have been qualified on the sixth, might have become disqualified between the sixth and tenth of March. We are of the opinion that this point is not well taken, inasmuch as when said jurors appeared on the tenth, defendant or his counsel, if they had so desired, could have examined them to ascertain the fact whether they, or any of them, had become disqualified by anything done or said between the said two dates.

The course pursued by the circuit judge is not open to the objection made, and the adoption of any other course would lead to confusion in the orderly conduct of

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the business in such courts, and be subject to the same objection here made. Suppose that the *venire* in question had been returned on the tenth, the day the cause stood for trial, and the court had then found a panel of forty persons, who were competent to serve as jurors; the defendant, under the law, would then have been entitled to a list of such jurors, forty-eight hours before the trial, thus necessitating its postponement for two days, and when called, after the expiration of forty-eight hours, the objection that the jurors who had been found qualified two days before might have become disqualified in the *interim*, might be made with as much propriety and reason as it is now made to the action that was taken. When a person stands indicted for murder in the first degree, the legislature has wisely provided that he shall not be put upon his trial until he has been furnished, forty-eight hours before the trial, with a list of forty qualified jurors. Defendant has had the full benefit of this humane provision, such a list having been furnished seventy-two hours before he was called upon to submit himself to a trial.

It is also insisted, that the judgment should be reversed on account of the separation, of the jury. It appears from the affidavit of one of the deputy sheriffs, having the jury in charge, that, during the progress of the trial, at the request of the judge, he took one of the jurors into the jury room adjoining the court room to answer a call of nature. It also appears from the affidavit of another deputy, that he took three of the jurors from the grand jury room, where he had them locked up, to the privy back of the jail, and took them back as soon as they came out; that during their absence the other jurors were locked up in the jury room, which adjoined the court room, and which was also locked up; that nothing was said to these jurors about the trial. To reverse a judgment for such a separation as this, would be trifling with the administration of the law, and such action is in no

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way authorized by the ruling made in this case, when it was first before this court, the record in that case showing that one of the jurors was permitted to go to his home and remain all night, and that other jurors separated themselves from their fellows on two occasions.

No objection was made to the panel of jurors, nor to the manner of its selection, till after verdict, and the objection then made in the motion for new trial, that the jury was not summoned from the body of Pike county, came too late. *State v. Jones*, 61 Mo. 232; *State v. Ward*, 74 Mo. 253.

The instructions given by the court, defining murder in the first degree, and also the instruction embracing the law of self-defence, are the same as when the case was here before, and are such as have received heretofore the sanction of this court, and put the case, under the evidence, fairly to the jury.

It is also insisted, that the court erred in refusing to instruct the jury as to murder in the second degree. The instruction was properly refused, as the facts in evidence show the offence to be either murder in the first degree or nothing. The evidence shows that deceased was killed between twelve and one o'clock, while digging in a pond near his residence in Pike county, by a ball discharged from a gun, which passed through the heart and both lungs of deceased. No one witnessed the homicide except the defendant, Lemasters, a hired hand of deceased, who was in a barn near by, and Mrs. Utterback, who was at the residence, a short distance off, heard the report of the gun and deceased cry out, "Oh! Oh!". Lemasters ran out and found deceased lying about fifteen feet from where he had been at work, and Mrs. Utterback also came out and found her husband dead. About thirty-seven paces from where the body lay, near a hedge and rail fence, the tracks of a man were found. One of the tracks appeared to have been made by a boot with the heel off. The tracks went in a north

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and south direction, terminating at the fence. Between the fence and the body, a piece of powder-stained cotton flannel gun-patching was found.

The morning of the twenty-fourth of September, defendant was seen going in the direction of Utterback's with a gun on his shoulder. When the witness who saw him attempted to overtake him, he quickened his pace. The night after the homicide, several parties went to the house of defendant and arrested him. One of his boot heels was off and his gun was found to be loaded with the same kind of patching that had been found near the scene of the homicide. The following Thursday the defendant was taken to Bowling Green, the county seat, by several parties. While on the way he confessed that he had killed Utterback. He said Utterback had spoken disrespectfully of his wife, and had called him trifling (some of the witnesses testified to this, while others say that he, defendant, said nothing about the cause of his killing Utterback), and that his malice towards deceased had grown so that he could not control it, and he killed him. Subsequently, while being taken from Bowling Green to Louisiana, defendant made a similar confession to the marshal of Bowling Green and the carriage driver.

It was testified to by a witness, who heard defendant's confession, that he said: "My malice grew upon me so I could not control it, and I killed Utterback. I was up near his house on Sunday, and intended to kill him, but changed my mind. I came up Monday through the cornfield, heard Utterback called to dinner, and waited by the fence near where I knew he would go to work when he came out from dinner. When he came out and commenced digging in the pond, I spoke to him, saying: 'Good evening, Mr. Utterback,' and as he looked up, I shot him."

Defendant did not state in any of the confessions

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made by him, that Utterback had ever made threats against him.

On the part of the defence, the evidence of several witnesses showed that deceased had spoken some time before disrespectfully of defendant's wife; that deceased and defendant, some time previous, had a difficulty, and that deceased had said that if the law would not reach defendant, bullets would. Defendant, who testified in his own behalf, stated that he was not lying in wait to kill deceased; that when he shot Utterback he thought deceased was about to pull a pistol on him; that he saw no pistol, but thought from Utterback's motions he was about to draw one. Several witnesses, who assisted in taking off Utterback's clothes and preparing his body for burial, testified that he had no pistol on his person, and that the only things found in his pocket or on his person, were a pocket knife, a purse and a handkerchief.

The direct question, when this cause was first here, viz.: whether, under the facts which the evidence tended to establish, it was proper to give an instruction for murder in the second degree, was before the court, and it was held that they would not warrant such an instruction.

We have carefully examined the whole record, and find nothing in it which would justify an interference with the judgment, and from it have been impressed with the conviction that the homicide was committed under circumstances amounting to assassination by lying in wait, and that the verdict by the jury was fully warranted by the evidence.

Judgment affirmed, in which all concur, except Henry, C. J., absent.

• Gunby v. Brown.

*GUNBY, Appellant, v. BROWN, Public Administrator,
et al.*

1. **Administrator: SALE OF REALTY TO PAY DEBTS: LIMITATION.** There is no statute of limitations in this state prescribing the time within which an administrator must procure an order for the sale of real estate to pay the debts of the estate, and, such being the case, he must do so within a reasonable time.
2. ———: ———: **REASONABLE TIME.** What is a reasonable time must be determined from all the circumstances of the case; each particular case, to a great extent, furnishing its own rules.
3. ———: ———. A delay of twelve or thirteen years after the granting of letters of administration *held*, under the circumstances of this case, to be inexcusable.
4. **Injunction.** Injunction will lie to prevent a sale under an order of the probate court obtained after such unreasonable delay.

Appeal from Grundy Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED.

Broadbuss & Wait for appellant.

(1) Injunction will lie to prevent cloud on title. *Mechanics Bank v. The City of Kansas*, 73 Mo. 556-9, and authorities cited; *Harrison v. Utterback*, 57 Mo. 519, and authorities; *Vogler v. Montgomery*, 54 Mo. 579.

(2) The execution and sale made under judgment in the circuit court was valid and conveyed south half of land. *Speer v. Sample*, 4 Watts (Pa.) 367; *Heard v. Sack*, 81 Mo. 610; *Union Bank v. McWharter*, 52 Mo. 34; *Coleman v. McNulty*, 16 Mo. 173; *Lewis v. Coombs*, 60 Mo. 44.

(3) The deed made upon execution sale from county court, though void, was color of title. *Jackson v. McGruder*, 51 Mo. 55; *Hamilton v. Bogges*, 63 Mo. 233;

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Rannels v. Rannels, 52 Mo. 109; *Crispen v. Hannavan*, 50 Mo. 536. (4) Color of title is evidence and notice of adverse possession which will ripen into title. *Pillow v. Roberts*, 13 How. 472; *Wright v. Matson*, 18 How. 50. (5) Ten years open, notorious, adverse and hostile possession make perfect title. *Nelson v. Brodhack*, 44 Mo. 597, 600; *Allen v. Mansfield*, 83 Mo. 688; *Key v. Jennings*, 66 Mo. 356. (6) Respondent is estopped by his laches. *Dickenson v. Colgrove*, 100 U. S. 578; *Barnes v. Kay*, 7 Ind. 301; *Shaw v. Beebe*, 35 Vt. 205; *Peery v. Hall*, 75 Mo. 503; *Brown v. Brown*, 30 N. Y. 519. (7) If the administrator was guilty of neglect, then the remedy of respondent was on the bond of prior administrator in first instance, and not against the land until that remedy was exhausted. *Felix v. Southard*, S. C. Mo. Oct. term, 1883. (8) Respondent Woodson was guilty of laches, and ought not now to be permitted to assert his claim against *bona fide* purchasers. *Lansdale v. Smith*, U. S. S. C., Oct. 1882, 16 C. L. J. 28; *Landrum v. Union Bank*, 63 Mo. 52; *Evans v. Snider*, 64 Mo. 519; *Stevenson v. Saline County*, 65 Mo. 430; *Bliss v. Pritchard*, 67 Mo. 190. This rule applies to claims in the probate court. *Mooers v. White*, 6 John's Chan. 375; *Estate of Crosby*, 55 Cal. 574; *Gabriel v. Godfrey*, 4 Mich. 315; 66 Ill. 224; 41 Iowa, 255.

Crosby Johnson for respondents.

(1) The sheriff's deed to Gideon & Woolsey was made during a session of the county court, not of the circuit court, and, for that reason, was void. It could only confer color of title. (2) The other sheriff's deed was made about one month after the death of Rogers and was, therefore, void. *Swearingen v. Adm'r*, 7 Mo. 421; *Walker v. Carson*, 16 Mo. 68; *Miller v. Doan*, 19 Mo. 650; *Hardin v. McCanse*, 53 Mo. 255; *Wernecke v. Wood*, 58 Mo. 352, and *Wernecke v. Kenyon*, 66 Mo. 547,

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and *Brown v. Wood*, 64 Mo. 547, where the same doctrine is enunciated. Also, *Mitchell v. Maxent*, 4 Wall. 237; *Smith v. Reed*, 52 Cal. 345; *Wallace v. Swinton*, 64 N. Y. 188; *Cadmus v. Jackson*, 52 Pa. St. 295. In Freeman on Execution (sec. 55), it is said that the weight of authority is that the power to issue execution is extinguished by the death of a sole defendant. (3) To the proposition that ten years' adverse possession makes perfect title there are well established exceptions. One of the exceptions is that the limitation does not begin to run until there is a person in existence who may contest the right of possession with the occupant. As Angell (Lim. sec. 54) says: "The term, cause of action, implies not only a right of action, but that there is some person in existence who is qualified to institute process." The same principle is announced in *McDonald v. Walton*, 1 Mo. 726; *Dillon's Adm'r v. Bates*, 39 Mo. 292; *Polk's Adm'r v. Allen*, 19 Mo. 467. (4) The defendants were not guilty of laches in not seeking to obtain the order of sale sooner. (5) Plaintiff should have resisted the order of sale if interested in the estate and have appealed therefrom. *Callahan v. Griswold*, 9 Mo. 784; *Shields v. Ashley* 16 Mo. 471; *Langworthy v. Baker*, 23 Ill. 484; *Hopkins v. McCann*, 19 Ill. 484; *Colson v. Baker*, 1 Redf. 324; *Hunter v. French*, 86 Ind. A resort to equity is not the proper mode of obtaining relief. *Casey v. Murphy*, 7 Mo. App. 247; *Bailey v. Ross*, 68 Ga. 735.

BLACK, J.—A temporary injunction was awarded in this case, restraining the defendant, public administrator of Caldwell county, from selling the land in question for the payment of a debt of the estate of Samuel Rogers, deceased. On final hearing the injunction was dissolved. Rogers owned the half section of land now in question. He joined the confederate army in 1861, and died in Arkansas December 23, 1862. His death was not known in Caldwell county, the place of his resi-

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dence, until after the sheriff's sale next mentioned. A judgment was rendered in the county court of that county in May, 1863, against Rogers and others on a bond of indebtedness to the school fund. Execution was issued thereon and the north half of the land sold to Woolsey and Gideon in October, 1863. A judgment was also rendered in the circuit court against Rogers in 1862, before his death, execution was issued thereon January 21, 1863, after his death, by virtue of which the sheriff sold the south half of the land to Woolsey and Gideon in October, 1863. In and prior to 1866, Murphy acquired conveyances from and through these purchasers to the entire land, and in that year the widow of Rogers also conveyed her interest in all of the land to him. These deeds were all duly recorded about their respective dates. The heirs of Rogers instituted a suit for possession of the land in the circuit court, in 1875 against Murphy, which resulted in a decree, rendered in 1876, divesting the heirs of all interest in the lands, with a general judgment against Murphy in their favor for eight hundred dollars.

In May, 1875, Murphy made a deed of trust upon the land securing a large debt and by virtue of the deed of trust the land was sold, in 1877, to the plaintiff. He has sold part of the land with covenants, to protect which and the residue of the land he prosecutes this suit and this appeal. In 1867, after both of the sheriff's sales and after Murphy took possession of the land claiming in good faith to be the owner thereof, Henkins was appointed administrator of Rogers. Nothing appears to have been done by him. In 1880 the defendant, public administrator, procured an order to sell the land to pay a debt allowed in 1869 in favor of Woodson and another, amounting to something less than two hundred dollars.

The sheriff's deed, made by virtue of the county court judgment, recites a sale at a term of the county

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court, and the circuit court does not appear to have been then in session. As the sale was not made during a term of the circuit court, it is for that reason conceded to be void, and so it has been ruled. *McClurg v. Dollarhide*, 51 Mo. 347. The execution on the other judgment was issued and sale made after the death of Rogers. Generally such sale is void. *Wernecke v. Wood*, 58 Mo. 352; *Brown v. Woody*, 64 Mo. 547, and authorities there cited. Whether this deed could be upheld on the doctrine of *Lewis v. Coons*, 60 Mo. 44, we need not stop to consider. In the view we take of this case it is not necessary to further consider this question, for it, at most, only affects one-half of the land. Though these deeds were void, one on its face, still they constitute color of title. *Jackson v. McGruder*, 51 Mo. 55; *Hamilton v. Boggess*, 63 Mo. 233. Moreover, they not only define the limits of his possession, but gave character to and notice of his claim.

But assuming without deciding, that, because Murphy perfected his title by a deed from the widow, and the decree of title from the heirs, he is to be regarded as holding the title through them, and subservient to a proper administration of the estate, the question arises whether there is any limit of time within which lands may be sold for the payment of debts by an administrator, and if so, what is the limit. There is no statute which prescribes the time within which the administrator must procure an order for the sale of real estate to pay debts of the estate. Nor is there any analogy between an ordinary judgment, and an allowance by the probate court of these demands, as to the time within which they may be enforced. Nor can the statute of limitations with respect to personal actions have any application. A proceeding to sell real estate is but a step to be taken in the course of the proper administration of the estate. The Chancellor in *Mooers v. White*,

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6 John Ch. R. 375, said: "But I am not prepared to admit that the executor or administrator can, at any time, and in his discretion, apply for, and be *entitled* to an order for the sale of real estate; and I am of opinion, that whatever may be the merits of the present demand, the defendant, as executor, is now too late to apply for a sale of the real estate, and that his capacity for that purpose is entirely extinguished." Then, referring to the statutes, he proceeds: "I infer from them that the law intended that the executor or administrator should make his application with due diligence, and in a reasonable time, and if he does not, the judge or surrogate has, from the nature of his judicial trust, a discretion to reject the application. What is a reasonable time may be another question." This doctrine has met with approval in many of the states where there is no statute of limitations applicable to such proceedings. *Estate of Crosby*, 55 Cal. 574; *Estate of Godfrey*, 4 Mich. 315; *Woolf v. Ogden*, 66 Ill. 224; *McCrary v. Tasker*, 41 Iowa, 255.

By our law the debts must be exhibited for allowance within two years from the grant of letters of administration. If the personal estate be insufficient to pay the debts, the administrator may disclose that fact by petition and have an order for the sale of real estate. If he fail to make such application any creditor may do so, upon giving the administrator the prescribed notice. In short, the whole administration law contemplates that the affairs of the estate will be wound up as speedily as practicable. If the administrator is guilty of delay the creditors are armed with ample power to have him removed, or proceed themselves. In reason and justice there must be a limit of time in which this order of sale may be taken. As there is no statute upon the subject it must be done within a reasonable time. What that is, must in this, as in all cases where the sale is applied for, be determined from all the circumstances, and each

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particular case must, to a great extent, furnish its own rule.

It may be said it was the duty of Murphy through whom the plaintiff claims, to see that the administration was closed at an earlier day. It is a circumstance worthy of consideration that he all the while claimed by a title, which, if good, was paramount and superior to the demands here in question. It must be that the administrator and creditor also supposed his title was superior. But if he is in no better position than the heirs and purchasers from them, the language used in *Estate of Crosby, supra*, is quite pertinent, which is: "Nor does the fact that the heirs do not call for an accounting in the probate court, and for sale of real estate, if necessary, constitute any excuse for the delay of the administrator or creditor. The proceeding for the sale of real property is hostile to the heirs, and there is no principle which makes it *their* duty to initiate a suit adversely to themselves, the failure to commence which by the proper party may result to their benefit."

Here the administrator was appointed in 1867. The debt was allowed in 1869. It would seem there was no personal property to be administered upon, and nothing to call for any delay. In 1874 an order was made upon the report of Herkins showing no assets, that the administration be "discontinued until such time as the court may order the same to be proceeded with." In 1877, ten years after the grant of letters, this order is set aside and Herkins was relieved and the estate ordered into the custody of the then public administrator, which order was also revoked in that year. In 1880 the estate was ordered into the hands of the defendant on motion of Woodson, the then owner of the demand, whereupon the order of sale in question was procured. Why this delay of twelve or thirteen years, when there appears to have been but a single demand, and no personal property

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to administer upon ? The record fails to give any satisfactory answer. The delay is inexcusable.

The sale, if made, cannot be said to be void on its face, and a deed made pursuant thereto will cloud and depreciate the plaintiff's title. The power of a court of equity to prevent this cannot be disputed. The contention is, however, that this resistance should have been made to the order of sale in the probate court and that it cannot be made elsewhere. It does not appear that the plaintiff had actual notice that such an order had been applied for. The notice is by publication. But if he was bound to take notice of such proceeding, at this late day, and could have appeared and resisted the order in the probate court, we think he may still have the remedy by injunction in the circuit court. His claim for relief addresses itself to a court of equity. The circuit court is the most appropriate tribunal to hear and determine such questions. The pleadings and procedure in the probate court are all not so well adapted to a full investigation of such equities. The circuit court has the power to grant full relief, and, under all the circumstances of this case, the plaintiff might well appeal to that court for relief.

The judgment, including that assessing damages on the bond, is reversed and the cause remanded, with directions to the circuit court to make the temporary injunction perpetual. Norton, J., dissents. The other judges concur.

CHEW et al. v. ELLINGWOOD et al., Appellants.

1. **Bond : BANK : BOOK-KEEPER, DEFALCATION OF.** The fact that the book-keeper of a bank has, with the consent of its cashier, taken its money not due him and applied it to his own use, will not relieve

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either the book-keeper or his sureties from liability in an action on his bond which contained a provision that he would truly account for all moneys belonging to the bank, and apply its funds to their proper uses.

2. ———: ———. The bond was given for the benefit of the stockholders and creditors of the bank, and the fact that the cashier knew of or connived at the book-keeper's defalcation can constitute no defence.
3. **Bank Directors, Negligence of.** Nor would the negligence of the directors, whereby they failed to discover the defalcation of the book-keeper, constitute a defence to an action on the bond.
4. ———: **DIRECTORS, ASSIGNMENT BY FOR BENEFIT OF CREDITORS.** Where there is nothing in the charter or general laws of the state forbidding it, the directors of an insolvent bank have the right to make an assignment for the benefit of its creditors.

Appeal from Buchanan Circuit Court.—HON. G. D. BURGESS, Judge.

AFFIRMED.

Silas Woodson, Crosby & Rusk and James P. Thomas for appellants Ellingwood and Bailey.

(1) The court below should have permitted appellants, Ellingwood and Bailey, to file the amended answer. R. S., 1879, sec. 3567, p. 610; *Wellman v. Dismukes*, 42 Mo. 101. (2) The board of directors, without a vote of stockholders authorizing it, had no power to transfer the entire assets of the bank, including the unpaid capital stock, thereby putting it out of the power of the corporation to carry on the business or accomplish the purpose for which it was created. *Rollins v. Clay*, 33 Me. 139; *Abbott v. American Hard Rubber Co.*, 33 Barbour, 579; *Hartford & N. H. Ry. Co. v. Crosswell*, 5 Hill, 383; *Bu-ford v. Keokuk N. L. Co.*, 3 Mo. App. 166; *Price v. St. Louis Mutual Life Ins. Co.*, 3 Mo. App. 262; *Atlantic & Pacific Ry. Co. v. City of St. Louis*, 66 Mo. 247 (sub-head "Corporation Deeds.") (3) The knowledge of the secretary or cashier, as he was styled after 1872, pertain-

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ing to the business of the institution under his management and control, was knowledge of the bank. *Bank of America v. McNeil*, 10 Bush, 59; *Harrisburg Bank v. Tyler*, 3 Watts and Sergeant, 376. (4) In the transaction and management of its business, the secretary or cashier was the bank—the corporation itself—and his acts are its acts. *Bissell v. First National Bank*, 69 Pa. St. 415; *Bank of Kentucky v. Schuylkill Bank*, 1 Par.'s Selected Cases, 180; *Merchant's Bank v. State Bank*, 10 Wallace, 604, and authorities there cited; *Caldwell v. The National Mohawk Valley Bank*, 64 Barb. 340; *Wakefield Bank v. Truesdell*, 55 Barbour, 604; *Lloyd v. The West Branch Bank*, 15 Pa. St. 172. (5) The directors are presumed to know, and are bound by the facts known to the cashier, or that are shown upon the face of the books of the bank, and are bound by a line of conduct that they have suffered the cashier to pursue for years without objection. *New Hope & Delaware Bridge Co. v. Phoenix Bank*, 3 N. Y. 156; *Bank of America v. McNeil*, 10 Bush (Ky.) 59; *Caldwell v. National Mohawk Valley Bank*, 64 Barbour, 342; *The City Bank of New Haven v. Perkins*, 4 Bosworth, 441-444; *United Society of Shakers v. Underwood*, 9 Bush (Ky.) 621. (6) From the third, fourth and fifth points, as applied to the facts in this case, it follows that the relation of debtor and creditor existed between Riley and the bank, hence, no liability attaches on the bond. *Jones v. Biggs*, 1 Jones' Law (N. C.) 364. (7) This action cannot be maintained in the name, or for the benefit of T. J. Chew, Jr., and A. C. Craig, because they are the sureties on the bond of John Williams as cashier, and as such are liable for the amount of Riley's overdrafts, by reason of the failure of Williams to report such overdrafts to the board. The transfer of the assets of the bank to Chew and Craig was without consideration and is void, the court had no authority to sanction or approve such transfer, and its order to that effect has no

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validity. The effect of the transaction was to make the Buchanan bank pay off and discharge the liability of Chew and Craig on the cashier's bond, at the expense of the stockholders, without their consent or knowledge. (8) Williams, by virtue of his office as cashier, had the superintendence of the books of accounts of the bank. Morse on Banks and Banking (2 Ed.) 156. (9) The bond is to be strictly construed as against the sureties; their liability cannot be extended by construction or doubtful implication. *Taylor v. Parker*, 43 Wis. 81; *Blair v. Perpetual Ins. Co.*, 10 Mo. 566; *Nolley v. Callaway County Court*, 11 Mo. 463; *City of St. Louis v. Sickles*, 52 Mo. 126; *Home Savings Bank v. Traube*, 75 Mo. 199. (10) The operative force and effect of the words used in the condition of the bond is limited and restricted by the recital of the bond. *The National Mechanic's Banking Association v. Conkling*, 90 N. Y. 116. (11) The "money, property and funds" of the company, referred to in the condition of the bond, are such as came into the principal's hands, or were received by him by virtue of his office or employment as book-keeper. Brandt on Sur. and Guar., sec. 451; *People of N. Y. v. Pennock*, 60 N. Y. 423; *Nolley v. Callaway County Court*, 11 Mo. 463; *City of St. Louis v. Sickles*, 52 Mo. 126. (12) The court may disregard the conclusions and inferences drawn by the referee and render such judgment as the facts that are found by the referee and supported by the evidence will warrant. *Moniteau National Bank v. Miller*, 73 Mo. 187. (13) The failure to appoint a successor to Mr. Riley, as book-keeper, in 1869, when Mr. Hoagland was elected president, and Mr. Williams secretary, by the board, terminated the liability of the appellants as sureties on Mr. Riley's bond as effectually as if the board had at the same time appointed another person to succeed Mr. Riley as book-keeper.

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B. R. Vineyard for respondents.

(1) The report of a referee is equivalent to the special verdict of a jury, which will not be disturbed if there is any evidence to support it, and this court will not consider the weight of the evidence in such cases. *Western, etc., Association v. Kribben*, 48 Mo. 41; *Gimbel v. Pignero*, 62 Mo. 242; *Wiggins Ferry Co. v. Ry. Co.*, 73 Mo. 419; *Frantz v. Dietrick*, 49 Mo. 95; *Brooks v. West*, 3 Mo. App. 581, at bottom; *Woods v. Mo., etc., Co.*, 3 Mo. App. 602. (2) Where there is nothing in the charter or general statutes prohibiting it, the directors of any corporation in failing circumstances may make a general assignment for it for the benefit of its creditors, without first obtaining the sanction of its stockholders to do so. *Shultz v. Sutter*, 3 Mo. App. 137; *Dana v. Bank of U. S.*, 5 W. and S. 223; *DeCamp v. Alward*, 52 Ind. 468; *Cotton v. Eagle Bank*, 6 Conn. 233; *Town v. Bank*, 2 Dougl. (Mich.) 530; *Union Bank v. Ellicott*, 6 Gill & J. 363; *State of Maryland v. Bank of Md.*, 6 Gill & J. 206; *DeRuyter v. St. Peter's Church*, 3 Barb. ch. 119, 124; s. c. affirmed, 3 N. Y. 238; *Lenox v. Roberts*, 2 Wheat. 373; Burrill on Assignments, sec. 64; Angell & Ames on Corp., sec. 191; *Hurlbut v. Carter*, 21 Barb. 221, 224; *Ringo v. Real Estate Bank*, 13 Ark. 563; *McCallie v. Walton*, 37 Ga. 612; *Flint v. Clinton Co.*, 12 N. H. 435; *Gilson v. Golthwaite*, 7 Ala. 281. (3) The sureties are joint obligors with the principal on the bond and are alike bound with him. *Pittsburgh v. Shaeffer*, 59 Pa. St. 357; *Engler v. Ins. Co.*, 46 Md. 322; *The Home Sav. Bk. v. Traube*, 75 Mo. 202. (4) While the bond did not define the trust reposed in Riley, it indicated the department of duty to be assigned to him, and guaranteed that the appointee was a trustworthy person to be introduced into the bank to dis-

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charge that duty. *Rochester Bk. v. Elwood*, 21 N. Y. 91; *German Bk. v. Auth.* 87 Pa. St. 419; *Engler v. Ins. Co.*, 46 Md. 322; *Angell & Ames on Corp.*, sec. 319; *Hart v. Pittsburgh, etc.*, 81 Pa. St. 466. (5) Riley did not "well and truly and faithfully perform all his duties" in making false monthly statements of the affairs of the bank, for the use of the directors, by reason of which they were kept in ignorance of its true condition, and in not informing the board of his overdrafts, and those of Williams, and in so keeping his books that such overdrafts were not discovered. *Nat. Bk. v. Drake*, 20 Kas. 328. (6) The only way one owing money to another can "account for it" in law is to pay it. *State ex rel. v. Williams*, 77 Mo. 463; *State ex rel. v. Colman*, 73 Mo. 685; *State ex rel. v. Steele*, 21 Ind. 207. (7) The directors had no power to permit Riley to overdraw his account, much less did Williams, the cashier, possess such power. *Market Street Bank v. Stumpe*, 2 Mo. App. 545. Nor had Williams any power to release any part of any claim due the bank. *Davis Co. Sav. Ass'n v. Sailor*, 63 Mo. 24. In fact, no officer or agent of a bank possesses any power to confer authority on any other agent to perpetrate a wrong on the bank. Brandt on Suretyship, sec. 474; *Nat. Bk. v. Drake*, 29 Kas. 328; *Minor v. Bank*, 1 Pet. 46; Morse on Banking. (8) It is no defence that the directors were guilty of negligence in failing to discover before the assignment that Williams and Riley had for a series of years been improperly taking the bank's money. *Pittsburgh v. Shaeffer*, 59 Pa. St. 357; *State, etc., v. Atherton*, 40 Mo. 216; *Minor v. Bank*, 1 Pet. 46; *Market Street Bank v. Stumpe*, 2 Mo. App. 545; *Taylor v. Bank*, 2 J. J. Marsh. 564; *Hart v. Pittsburgh*, 81 Pa. St. 466; *United States v. Kirkpatrick*, 9 Wheat. 720.

NORTON, J.—This suit is founded on the following bond: "Know all men by these presents that we,

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Samuel J. Riley, as principal, and J. W. Bailey, J. L. Ellingwood and M. D. Morgan, as securities, are held and firmly bound unto the Buchanan Life and General Insurance Company, in the sum of five thousand dollars, for the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this second day of July, 1867. The condition of the above bond is such that whereas the said Samuel J. Riley has been elected, and still is, book-keeper in, of and for the said Buchanan Life and General Insurance Company. Now, if the said Samuel J. Riley shall well and truly and faithfully perform all his duties as such book-keeper, so long as he may continue to serve as such, for the present year, and for all time to come, whenever re-elected, and shall well and truly account for all money and property belonging to said insurance company, or which may pass through his hands, by virtue of his said office, during his service as such book-keeper, and apply the funds of said company to their proper uses and purposes, then this bond to be null and void ; otherwise, to remain in full force.

“[Signed.]

“SAMUEL J. RILEY, (Seal.)

“J. W. BAILEY, (Seal.)

“J. L. ELLINGWOOD, (Seal.)

“M. D. MORGAN. (Seal.)”

Among the other breaches of the bond assigned are the following, to-wit: The said Riley did not well, or truly, or faithfully perform all his duties as such book-keeper of said company during the time covered by said bond, from July 2, 1867, to January 15, 1873, nor did he during said time well or truly account for all money belonging to said company, nor did he during said time apply the funds of said company to their proper uses and purposes, in this: During the time of his service as such

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book-keeper as aforesaid, from July 2, 1867, to January 15, 1873, and within ten years next before the bringing of this suit, he, the said Riley, wrongfully took out of and from said company and bank, and appropriate to his own use large sums of money belonging to said company, whereby the same were wholly lost to said corporation, which sums so taken and appropriated by said Riley, and so lost to said corporation, together with the dates of such takings, conversions, and appropriation and loss, are of the amounts and dates as stated in the following itemized account thereof, and the balance thereof due said corporation, after allowing all proper credits to which the same is entitled, amounts in the aggregate, to \$3,814²⁷/₁₀₀, no part of which has ever been paid to said company or bank.

The defendants, by answer, put in issue the averments of the petition, and set up that all the money that came to the hands of Riley that was used by him was borrowed of the company in the usual course of business with said company. The new matter set up was denied by replication, and, by agreement, the cause was referred to Franklin Porter, as referee, to report on the facts.

Various exceptions were taken to the report of the referee, which were overruled, the report confirmed, and judgment entered in favor of plaintiffs, from which the defendants have appealed. And the controlling question in the case is, whether under the terms of the bond and the facts found by the referee, the defendants were or not liable.

Among other things found by the referee in his report, was that it was the duty of Riley, as book-keeper, to "refrain from taking from said company any money not then due him." That defendant Riley's desk, as book-keeper, was kept inside the counter of said bank, and twelve or fourteen feet therefrom. During the day the money of the bank was kept upon said counter, and

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said Riley, by virtue of his position as said book-keeper, had access to said moneys, and when the teller was busy at the counter, said Riley frequently assisted him in receiving and paying out money. The employes of said company and bank, including said book-keeper, received their salaries in this way: The amount of the salary was credited to each on the company's books upon the last business day of each month, and they took the money themselves from the cash counter as they desired it, leaving memoranda of the charges to be made therefor upon the check files. Defendant Riley did that way all the time, and drew no checks upon the bank. Whenever he "wanted money he went and took it, leaving a memorandum of the amount taken upon the check files." All of which manner of taking money Mr. Williams knew, and did not object thereto. That between the date of said bond and January 15, 1873 (which was the date of the new bond given by said Riley as book-keeper), said account of Samuel J. Riley shows that from day to day, or at intervals of a few days, said Riley continuously, during all the time covered by the bond in suit, drew out and took of the moneys of said insurance company and bank, for his own use, many sums of money, in varying amounts, aggregating the sum of \$9,590.26; and during the same period credited himself from time to time with the amount of his salary on the last business day of each month, and, also, with the amounts of twelve different deposits made by him at different times (the sum of said deposits being \$1,065.78). The aggregate of all said credits so shown was the sum of \$6,699.10, which, deducted from the amounts taken by him as aforesaid, leaves as the amount of money so taken by him, over and above all credits, between said dates, the sum of \$2,291.16. That the directors knew nothing of the existence of overdrafts by defendant Riley until the day before the bank made an assignment for the benefit of its creditors.

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This report of the referee stands as a special verdict, and if there was evidence tending to establish the facts found, this court will not disturb the finding. *Wiggins Ferry Co. v. Chicago & Alton Ry. Co.*, 73 Mo. 389; 48 Mo. 37; 49 Mo. 95.

It appears that there were no by-laws of the company prescribing the duties of book-keeper, and the referee was, therefore, left to ascertain what his duties were from the evidence before him; and the fact found by him that it was the duty of the book-keeper to refrain from taking from said company any money not due him is abundantly sustained by the evidence of Williams, Goff and Sayle, all of whom professed to be acquainted with the duties of a book-keeper in a bank.

Mr. Sayle, who had experience as a book-keeper in a bank, testified as follows: "I am acquainted with the duties of a bank book-keeper. In the absence of any by-law or regulation on the subject of overdrafts, neither the book-keeper nor any other person has any right to overdraw his account in the bank, and it would be a violation, in my opinion, of the book-keeper's duties to do so. If the book-keeper of a bank has a custom of taking from the cash counter sums of money whenever he wants them, and in this way draws out more money than he has in the bank, and more than his salary amounts to, he violates his duty as such book-keeper. The duties of officers in banks vary more or less in different banks, as provided by the by-laws. My testimony referred to the duties of a book-keeper in the absence of by-laws. In the absence of a provision in the by-laws, no officer of a bank has a right to permit an overdraft, and if he does so he is personally responsible for it, that is, the officer permitting the overdraft."

While the evidence of these witnesses proved the fact above found by the referee, the bond, by its plain terms, imposed upon Riley the obligation to well, truly and faithfully perform all his duties as such book-keeper,

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to well and truly account for all money and property belonging to said company, or which might pass through his hands by virtue of his office, and apply the funds of said company to their proper uses and purposes. The referee found as facts that Riley did not refrain from taking money from the bank not due him, but, on the contrary, that he did take large sums not due; that Riley did not account for all money and property belonging to the bank, nor apply the funds thereof to their proper uses and purposes, but, on the contrary, that he took large sums of money which he applied to his own uses and purposes. It thus appears that every condition of the bond was broken by Riley.

While the evidence shows, and the referee so finds, that the employes of the bank were credited at the end of each month with the amount of their salaries, and that they took the money themselves from the cash counter, as they desired it, leaving memoranda of the charges to be made therefor upon the check files, and that defendant Riley did that way all the time, but drew no checks on the bank, and that Williams, the cashier, knew of this manner of their taking money and did not object thereto, it also shows that while Williams had knowledge that Riley's account was overdrawn four or five hundred dollars, that he never consented for him to overdraw his account at all. We have been cited to a number of authorities by counsel to establish the principle that the liability of sureties cannot be extended by construction or doubtful implication. While the principle invoked is elementary law, it is equally true that a bond should be so construed as not to eliminate, but to give effect to all the provisions it contains. The bond in question was taken for the benefit and protection of the stockholders and creditors of the company, and it provided, among other things, that Riley should well, truly and faithfully perform all the duties of book-keeper. As to what such a condition im-

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plies, the following authorities will show. In the case of *Railroad Co. v. Shaeffer*, 59 Pa. St. 357, Sharswood, J., in speaking of a bond containing such a condition, says that "the sureties, by executing the bond, became responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. * * * The fact that there were other unfaithful officers * * * who knew and connived at his infidelity ought not, in reason, and does not, in law or equity, relieve them from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such results can be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to and connived at by the officers of the bank, was held to be no defence." *Vide Taylor v. Bank of Kentucky*, 2 J. J. Marshall, 564.

So, also, it is said in case of *Rochester City Bank v. Elwood*, 21 N. Y. 94: "I cannot doubt that the covenant that Gold should faithfully discharge the trust reposed in him as assistant book-keeper, included within its scope and intention an engagement that the employe would not transcend the limits of the trust reposed, in availing himself of his position to misapply or embezzle the funds of his employer. There has not been a faithful discharge of the trust reposed in a book-keeper of a bank, who transcends the limits of and abuses his trust, and loss thereby ensues to the employer." See, also, *German Bank v. Auth*, 87 Pa. St. 419; *Engler v. People's Fire Insurance Co.*, 46 Md. 322. Under the above authorities, if Williams, the cashier, had knowledge of the fact that Riley was taking money of the bank not

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due him, and applying it to his own use, and consented to it, such knowledge and consent could not have the effect of relieving either Riley or his securities from the liability of their undertaking, that Riley would truly account for all money belonging to the bank, and apply its funds to their proper uses, any more than a debtor of the bank to whom Williams might have surrendered the note of such debtor without payment, and as a gift, would be relieved from its payment.

In the case of *Daviess County Savings Association v. Sailor et al.*, 63 Mo. 24, it is held that the general duties of the cashier are to collect the notes and keep the funds arising from them, and deliver up notes when paid, and his representations made to a surety, that he will no longer be looked to for payment, will not bind the bank, nor will the bank be estopped from asserting its claim by reason of such assurance. That no officer or agent of a bank has power to confer authority on any other agent to perpetrate a wrong on the bank is established by the following authorities: *Brandt on Suretyship*, sec. 474; *National Bank v. Drake*, 29 Kas. 328; *Minor v. Mechanic's Bank*, 1 Peters, 46.

Neither can the defendants claim exemption from liability on their bond on the ground that the directors were negligent in not ascertaining the fact, till the day before the assignment was made, that Riley had been applying to his own use more money of the bank than was due him. Upon this branch of the case the following observations made in the case of *State to use, etc., v. Atherton*, 40 Mo. 216, are appropriate, viz.: "We cannot accede to the first proposition of counsel for defendant, that he is exonerated by reason of the negligence of the cashier and directors of the bank in failing to make frequent examinations of the affairs of the bank, to count the money, inspect the books, and generally watch over its concerns. The principle contended for would have the effect to deprive a corporation of all

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remedy against one agent on account of the negligence or default of another. The cashier might excuse himself by pleading the failure of the directors to perform their duty, and the directors would excuse themselves by showing that the cashier had been guilty of neglect, and omitted to execute the trust devolved upon him." See, also, *Minor v. Mechanic's Bank*, *supra*; *Market Street Bank v. Stumpe*, 2 Mo. App. 545; 2 J. J. Marshall, 564; 81 Pa. St. 466; *United States v. Kirkpatrick*, 9 Wheat. 720.

The point made by appellants' counsel, that the assignment made by the directors is void, must be ruled against them. The right of the directors of a bank in failing circumstances to make an assignment for the benefit of creditors, where there is nothing in the charter or general laws forbidding it, we think, is clear. See authorities under this head cited in respondent's brief. While, in the case of *Eppright v. Nickerson*, 78 Mo. 482, an intimation is made that the stockholders might question such right, it was expressly held that such assignment would be valid as against everybody else. Many of the authorities cited go to the extent of saying that under such circumstances the directors not only have the right, but that, in justice, they ought to make an assignment so that creditors might share equally in its assets. Indeed, under constitution and laws which make it a felony for directors and officers of a bank to receive deposits, knowing it to be in failing circumstances, it would seem to leave them no other alternative but to close its doors and make an assignment for the benefit of its creditors.

We have no doubt of the right of these plaintiffs to maintain this suit, and perceive no error in the record justifying an interference with the judgment. It is hereby affirmed. All concur except Henry and Sherwood, JJ.

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HENRY, C. J., DISSENTING.—There is no evidence tending to prove that the bank's books were not kept correctly by the book-keeper, precisely as they had been kept ever since the organization of the company, except in one item, wherein the book-keeper took credit to himself twice for the same amount, about five hundred dollars. The evidence proved, and so the referee found, that an examination of these books at any time would have disclosed the true condition of the bank, except as to the above item. The book in which individual deposit accounts were kept would not have shown the overdrafts made, either by the book-keeper or other customers of the bank, but other books kept by him in connection with that, would, and this was the system of book-keeping adopted and sanctioned by the bank, and there was no breach of his bond in thus keeping the books, although not the most approved method.

There is no pretense that the book-keeper ever used any money belonging to the bank, except such as he obtained by means of overdrafts, and that he was habitually over-drawing his account was known and consented to by the cashier. True, he says he did not consent to it, but, knowing it, and it being his duty, and in his power to stop it, he is to be taken to have acquiesced and consented to the overdrafts made by the book-keeper, and the bank is as much bound by it as if the cashier, standing in its stead, and as to such transactions to be regarded as the bank itself, had been expressly authorized by the board of directors to allow such overdrafts to be made by the book-keeper.

Nor does it help plaintiff's case that the cashier, aware that the book-keeper was making over-drafts, did not know the extent to which he was overdrawing his account. He could easily have ascertained, and, therefore, tacitly consented to any amount of overdraft he

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might make. The book-keeper, as to those transactions, was a customer of the bank. By its acquiescence he became its debtor, and it subsequently accepted and enforced a deed of trust executed by the book-keeper to secure the indebtedness thus contracted, and cannot hold his securities as for an embezzlement by the book-keeper of the amount of such indebtedness. DeColyar on Securities, 434, and cases cited. The obligation of the securities was to the bank, which had the right to permit their principal to overdraw his account, and thus become the debtor of the bank, but it cannot hold his securities for the failure of their principal to pay money so borrowed. They did not undertake as his securities for money borrowed by him, and even conceding that the bond is as broad as claimed, and bound the securities for thefts or embezzlements committed by their principal, the evidence establishes against the book-keeper no element of theft or embezzlement, but only that, with the consent of the cashier, he borrowed money from the bank.

The referee found that the bond obligated Riley to refrain from taking any money from said company, not due him. If this means that he obligated himself not to steal or embezzle the money of the bank, it may be conceded that the bond has that effect, but if it is meant by that finding that he obligated himself never, even with the consent of the bank, to overdraw his account or otherwise borrow money of the bank, there is nothing in the bond to warrant the finding. The cashier of a bank is the agent of the corporation. *Bissell v. First National Bank*, 69 Pa. St. 419; *Caldwell v. The National Mohawk Valley Bank*, 64 Barb. 333. "The bank will also be bound by the acts of the cashier, if the directors, either through inattention, or otherwise, suffer the cashier to pursue a particular line of conduct for a considerable period, without objection." *Ib.* "He is the general manager, and unless his operations are re-

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stricted by the directors, he is, for many purposes, looked upon by the law, and is treated as if he was, the whole body, whom he has power to bind, even by his tortious act." Grant on Banking, 518. "The cashier is the financial officer of the bank, and his agreements in behalf of his principal, in all matters relating to its business of discounting and banking are binding upon it, to the same extent as if made by a resolution of the board of directors." *Wakefield Bank v. Truesdell*, 55 Barb. 603. Directors will not be heard to say that they were ignorant of facts, "the existence of which is shown by the ledgers, books, accounts, correspondence, etc., of the bank, and which would have come to their knowledge but for gross neglect or inattention." *United Society of Shakers v. Underwood et al.*, 9 Bush. 611. De Colyar, in his work on Guaranties and Principal and Surety, at page 434, says: "It also appears that where one gives security for the conduct of another in a certain office, which brings him in contact with other persons also in the office, he has a right to expect that these persons will, in all things affecting the surety, conduct themselves according to law and discharge their duties." This is the precise language of Lord Brougham in *Mac-taggart v. Watson*, 3 C. & F. 525.

The same doctrine is recognized in *Meir v. Hardie*, 5 Shaw & Dunlop, 346, and in the *People v. Janson*, 7 Johns. 332, it is said: "The security had a right to look to the provisions of this statute, and to calculate his liability on the presumption that the duties enjoined on these public officers would be faithfully and punctually discharged. * * * There can be no doubt that the plaintiffs are chargeable with the consequences of the neglect, or breach of duty of their agents or public officers intrusted with this business."

The book-keeper in the case at bar, as to those overdrafts, stood as a debtor to the bank, the same as the numerous other depositors with the bank, whose ac-

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counts were overdrawn. Can it make any difference that, instead of using a formal check, he drew the money on tickets, which, though not in form, were in substance checks, and this with the knowledge and acquiescence of the cashier?

I think that the judgment should be reversed and the cause remanded, or that a judgment should be entered in this court for the sum for which the book-keeper twice took credit to himself, with interest from the date of that transaction.

COE V. RITTER, *Appellant*.

1. **Deed, Description in.** The description in a deed was as follows: "Beginning on south side of Broadway, 520 feet west of the east line of the northwest quarter of the southeast quarter of section three, township forty-five, range twenty-one, in Pettis county, Mo., thence south 165 feet, thence east 120 feet, thence north 165 feet, thence west 165 feet, to the place of beginning." *Held*, that it was sufficient.
2. ———: EVIDENCE. Where no uncertainty in description appears upon the face of a deed, but is shown by extrinsic evidence, it is then competent, by other extrinsic evidence, to apply the description in the deed to the land intended to be described.
3. **Deed, Recitals in :** RETROSPECTIVE ENACTMENTS. It is competent for the legislature, by express enactment (Laws 1881, p. 171), to make the recitals in a mortgage, or deed of trust, *prima facie* evidence of the truth thereof, and it is not trenching upon private rights, nor an impairment of the obligations of contracts to apply such enactment to deeds previously executed.
4. **Evidence, Change in Rules of :** CONSTITUTIONAL LAW : RETROSPECTIVE LEGISLATION. Rules of evidence, like other rules affecting the mere remedy, are subject to continuous modification and control by the legislature, and changes effected in these rules by legislative authority may be made applicable to existing causes of action, without trespassing upon constitutional prohibitions respecting retrospective enactments.

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5. **Judgment, Written Confession of by Husband and Wife.** A judgment rendered upon the mere written confession of a husband and his wife, filed in court, while it might be valid against the husband, can have no operation or force against the wife, whether it be regarded as simply a moneyed judgment against the wife, or as a judgment possessing attributes of that nature combined with others, which authorized a sale of her land for the enforcement of a mechanic's lien. *Per Sherwood, J.*
6. **Practice : PARTIES : ENFORCEMENT OF MECHANIC'S LIEN.** Where, in a proceeding to enforce a mechanic's lien, the trustee and beneficiary in a prior deed of trust are not made parties, the judgment will have no force or effect as to the beneficiary in, or purchaser under, the deed of trust, and the purchaser, at a sale upon the mechanic's lien, will only acquire the equity of redemption, and the right to the premises after the trust lien has been paid.
7. **Mechanic's Lien : ACCOUNT OF DEMAND : EVIDENCE.** In a proceeding to enforce a mechanic's lien, the lienor must stand or fall by the account which he files, and the dates and items which he specifies, and cannot defeat or postpone a prior lienor or incumbrancer by matter *in pais*.
8. **Judgment Nunc pro Tunc : RIGHTS OF THIRD PARTIES.** A judgment, *nunc pro tunc*, will not be allowed to operate to the prejudice of the rights of third parties acquired in good faith between the time of the rendition of the original judgment, and the entry of the judgment *nunc pro tunc*.
9. **Judgment : EXECUTION : SALE.** A sale under an execution issued upon an original judgment, which conforms to a judgment *nunc pro tunc*, instead of such original judgment, is invalid.
10. **Parties, Substitution of : STATUTE.** One who acquires the title of a purchaser at a sale under a deed of trust, may, under the statute (R. S., sec. 3671), be substituted as party-plaintiff, after the institution of an ejectment suit by such purchaser.

Appeal from Pettis Circuit Court—HON. J. P.
STROTHER, Judge.

AFFIRMED.

E. J. Smith for appellant.

(1) It was error to admit in evidence the deed of Sheriff Murray, acting as trustee, without proof of the

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absence from the state of Powell and Shackelford, trustees, which absence was necessary to give the sheriff power to act, and the recitals in the sheriff's deed are not evidence of that fact. The deed from Bunn to Coe was improperly admitted. It was void for want of description. (2) The lien dated from the commencement of the work. *Allen v. Sales*, 56 Mo. 28; *Douglass v. Zinc Co.*, 56 Mo. 388; *Reilly v. Hudson*, 62 Mo. 383. The fact that Bunn was not made a party to the lien suit makes no difference here, as plaintiff does not offer to redeem from the lien. *Heim v. Vogel*, 69 Mo. 529. (3) Plaintiff Coe could not recover, as he was not entitled to possession at the commencement of the suit, and did not bring suit. Bunn could not recover on a title acquired after the commencement of the suit. The right of possession that existed July 20, 1881, between Bunn and Ritter, and the rights, as to rents, that existed between Coe and Ritter, on and after September 7, 1881, cannot be litigated in this case. *Wilson v. Garoghty*, 70 Mo. 517.

A. W. Anthony for respondent.

(1) The description in the deed was sufficiently certain. *Hardy v. Matthews*, 38 Mo. 121; *Campbell v. Johnson*, 44 Mo. 248. (2) The general judgment rendered against Mrs. Hickey was a nullity, and a sale under it conveyed no title, not even the husband's interest as tenant by the curtesy, if it existed. *Higgins v. Peltzer*, 49 Mo. 152; *Corrigan v. Bell*, 73 Mo. 53; *Werneke et al. v. Woods, Adm'r*, 58 Mo. 352. Her confession of judgment, if in proper form, was a nullity. *Higgins v. Peltzer*, 49 Mo. *loc. cit.* 156. It is not in proper form. R. S., p. 629, sec. 3697. The attempt made about four years afterwards, to correct the judgment rendered, by a *nunc pro tunc* entry, was of no validity. The property was not again sold after the *nunc pro tunc* entry. Ritter, therefore, acquired noth-

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ing by his deed. (3) Next, as to the *nunc pro tunc* entry: In *Jones v. Hart*, 60 Mo. 351, the whole question is carefully considered, and, applied to this case, as is against the appellant. See also *Fetters v. Baird*, 72 Mo. 389. It could not affect Bunn's title. *McClanahan v. Smith*, 76 Mo. 428.

SHERWOOD, J.—This action, ejectment, originated in a contest between Bunn, the original plaintiff, the beneficiary in, and purchaser under a deed of trust, and Ritter, defendant, purchaser under a judgment for the enforcement of a mechanic's lien. The deed of trust, under which Bunn bought and plaintiff claims, was acknowledged and filed for record, August 9, 1873, by Catharine Hickey, and her husband, James, Catharine being the owner of the fee, and the admitted common source of title. A sale of the land conveyed by this trust deed, embracing the premises in dispute, as well as other land, occurred December 12, 1876, the sheriff of the county, Murray, being the acting trustee, authorized for that purpose by the deed itself, in the absence of Powell, the trustee, who was stated in the trust deed to be a resident of Connecticut.

Bunn became the purchaser at this sale, and, after bringing this suit, conveyed the land to Coe, the present plaintiff, by two deeds, the first a warranty deed, which does not, perhaps, sufficiently describe the land in suit; the second, which describes it as follows:

"Beginning on the south side of Broadway, 520 feet west of the east line of the northwest quarter of the southeast quarter of section three (3), township forty-five (45), range twenty-one (21), in Pettis county, Mo., thence south 165 feet, thence east 120 feet, thence north 165 feet, thence west 165 feet, to the place of beginning."

The sale at which defendant Ritter purchased, under judgment for enforcing his lien against the property in

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occurred September 5, 1876, and a deed was made to suit, him on the next day. The deed recites a judgment rendered September 21, 1874, on a lien filed February 25, of that year. The original lien paper was filed February 24, 1874, showing the last item for lumber sold was September 16, 1873. The original judgment, of date September 21, 1874, shows that on *that* day the cause was docketed and the petition filed for the enforcement of the lien. This judgment does not recite the appearance of the defendants, nor that they were served with process, but it does recite that the court found the amount for which judgment was rendered from the proof adduced, and from the "confessions of the defendants." Following what is called a "substituted petition," on which is no indorsement, or filing of date, or otherwise, there is a paper referred to by counsel for defendant, which bears date September 21, 1874, the date of the judgment, and is signed and sealed by Catharine Hickey, and her husband, James, by which they confess judgment for the amount rendered, and authorized judgment for that as well as for the enforcement of the mechanic's lien, and the judgment was rendered accordingly, as appears by the record. Neither Bunn, nor the trustee in the trust deed, were made parties to the proceeding for the enforcement of the mechanic's lien. The evidence shows that Cowsley was the carpenter and defendant the material man.

I. I find no difficulty as to the description of the land as set forth in the quit-claim deed from Bunn to plaintiffs. It is not shown that there is but *one* "Broadway" in Pettis county; it certainly does not appear from the face of the deed that there are *two*, and there is, therefore, nothing denoting uncertainty in the description. If there *are* two "Broadways" in Pettis county, then this must be shown by extrinsic evidence, and when shown, then it is clearly admissible, by other extrinsic evidence, to apply the description in the

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deed to the particular Broadway intended. *Hardy v. Matthews*, 38 Mo. 121; *Campbell v. Johnson*, 44 Mo. 247. It is not seen how the description of the initial point, in the present instance, is more uncertain than if the deed had said "beginning at a limestone rock 520 feet west of the east line," etc., in which case no one would doubt the sufficiency of the descriptive words.

II. Although the recitals in the deed of trust were not evidence at the time of its execution, yet, since that time, the legislature has, by express enactment, made such recitals *prima facie* evidence of the truth thereof, even as to deeds previously executed. Sess. Acts 1881, p. 171. And it was competent for the legislature to do this. When thus regulating the remedy and mode of proceeding in courts, the legislature is but engaged in the legitimate exercise of its accustomed functions, and does not, by so doing, trench upon vested rights, or impair the obligation of contracts. The right to have one's controversies determined by existing rules of evidence does not fall within the list of vested rights; nor does it constitute any essential portion of a contractual, or other right which a party desires to enforce. Such rules, like others affecting the mere remedy, are subject to continuous modification and control by the legislature, and changes effected in these rules, by legislative authority, may be made applicable even to existing causes of action, and will not trespass on constitutional prohibitions respecting retrospective enactments. Numerous instances and illustrations of this doctrine are to be found in the books. *Rich v. Flanders*, 39 N. H. 304; Cooley's Const. Lim. 351, 452, and cases cited.

III. In the view I take of this cause, it becomes unnecessary to consider the declarations of law given or refused. This will be made manifest as I proceed with this opinion. If the original judgment, of date September 21, 1874, which purports to enforce the me-

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chanic's lien, was rendered on the mere written confession of the husband, Hickey, and his wife, filed in court, as seems to be the case, such a paper, while it might be valid against the husband, could have no operation or force against the wife, whether the judgment be regarded as simply a moneyed judgment against the wife, or as a judgment possessing attributes of that nature combined with others, which authorized a sale of her land for the enforcement of the mechanic's lien. Considered merely as a moneyed judgment against the wife, it would be held null even if she had been served with process in the accustomed way. *Higgins v. Peltzer*, 49 Mo. 152. In the case just cited, that of *Caldwell v. Walters*, 18 Pa. St. 79, is noticed with approval, wherein it was held that a bond and warrant of attorney to confess judgment, given by a married woman and her husband, did not authorize judgment against her, and that a sale of her land, under such judgment, was, like the judgment on which it was based, absolutely void. In *Higgins v. Peltzer*, *supra*, other cases of similar import are cited, enforcing the doctrine already announced; and in that case it is held that such judgment, being absolutely void, it is open to collateral attack.

The cases which hold that a married woman cannot confess judgment where the result will be a personal judgment against her, do so upon the theory that a judgment is a specialty, creates a debt, is in the nature of a contract, and, therefore, cannot be taken against, or confessed by a person *non sui juris*. Freeman on Judgments, secs. 149, 150, and cases cited; Schoul. H. & W., sec. 331, and cases cited. And if a *feme sole* give a warrant to confess judgment, and marry before it be entered, the warrant is thereby countermanded, and judgment shall not be entered. *Anon.*, 1 Salk. 399. There are cases which hold that a married woman may lawfully confess judgment in a personal action, but they do so while admitting the rule to be otherwise at common

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law, placing their decisions expressly on the ground of innovating statutes, which permit a *feme covert* to sue and be sued, contract and be contracted with as a *feme sole*. *Bank v. Garlinghouse*, 53 Barb. 615; *Travis v. Willis*, 55 Miss. 557. In this state, at the time the judgment in question was rendered, a married woman still labored under the disabilities incident to her *status* at common law. R. S., 1879, sec. 3468. In *Patton v. Stewart*, 19 Ind. 233, while a warrant of attorney to confess judgment, acknowledged before the clerk by a married woman, was held invalid, as being a proceeding unknown to the law, intimation is given that she might, if present in open court, waive the service of process, but this is a point not necessary to be now considered, as the judgment does not recite such appearance, and counsel for defendant, in his abstract, relies on the statement filed in the cause, and attached to the substituted petition, whereby Hickey and wife, under their hands and seals, waived the issuance of summons, and confessed judgment.

I take it, that if a *feme covert*, in an ordinary action for the recovery of money, as has been frequently decided by this court, is an improper party defendant, and that a judgment against her is null, (*Alexander v. Lydick*, 80 Mo. 741, and cases cited), and if a judgment in such an action, rendered against a married woman upon a warrant of attorney, is also null, save where, by express statutory regulation, she is enabled to occupy the attitude and assume the *status* of one *sui juris*, as is shown by the authorities cited, then the judgment under consideration, in so far as it enforces the mechanic's lien against her property, as well as in so far as it authorizes a moneyed recovery against her, must share the same fate, and fall under the ban of the same prohibitory principle. It is wholly impossible, it seems to me, to point out any solid or reasonable distinction between the nature, or the result, of such extra-judicial

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confessions. Moreover, this court, in many cases, too numerous to mention, has, with unvarying firmness, followed and obeyed the statutory behest, in declaring that there is but *one mode* whereby husband and wife can convey, or affect the real estate of the latter, by the execution of any deed, or instrument of writing, and that is "*by their joint deed acknowledged*," etc. *Rannells v. Gerner*, 80 Mo. 474, and cases cited; R. S., 1879, secs. 669, 2197. It is needless to judge how easy would be the evasion of these statutory provisions and protections, if a married woman, by joining with her husband in the execution of an unacknowledged instrument, might authorize a judgment or decree to be entered, which, when enforced, would divest her of title in her real estate, and compulsorily convey her land. These reasons alone are sufficient to show the utter invalidity of the judgment recovered by Ritter in 1874, and to uphold the recovery obtained by plaintiff in the present action; but there are other reasons of equal cogency supporting that recovery, which I will proceed to mention.

IV. Neither Bunn nor the trustee in the deed of trust, were made parties in the proceeding to enforce the mechanic's lien. The language of the statute is express that: "In all suits under this article the parties to the contract shall, and all other persons interested in the matter in controversy, or in the property charged with the lien, may be made parties, but such as are not made parties shall not be bound by any such proceedings." R. S., 1879, sec. 3180.

The case of *Crandall v. Cooper*, 62 Mo. 478, is similar, in all its essential facts, to the case before us. There the deed of trust, Clark being the beneficiary, was recorded April 21, 1870. The mechanic's lien dated from the tenth day of July next thereafter. A sale occurred under the deed of trust, at which Clark became the purchaser, and received a conveyance of the property,

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and a sale also took place under the proceedings for the enforcement of the mechanic's lien, a deed being made to the purchaser, and it was ruled that under the statutory provisions applicable in such cases, that as Clark was not made a party to the proceedings to enforce the mechanic's lien, he was a stranger to them, and they had no force or effect on him; that as the law (R. S., sec. 3174) only gave the lien to the extent of the interest owned by the proprietor, and as that interest at the time the lien attached, was subject to Clark's prior lien, the purchaser at the sheriff's sale acquired no greater interest than the proprietor had, *i. e.*, the equity of redemption, or a right to the premises after the trust lien was paid off; but that as Clark was the purchaser under the circumstances already mentioned, his rights were paramount to any interest obtained through the enforcement of a lien acquired subsequently to that of his own. This case is decisive of the one at bar.

V. It has been urged that the lien of Ritter is prior to that created by the trust deed, because the work was begun before the deed of trust was executed. If this is true, it certainly does not correspond with the items in the lien, they ranging from September 2, to September 16, 1873. The claim is made that these dates are not *conclusive* on Ritter, and that he is at liberty to show that the materials began to be furnished at an earlier date, one anterior to that of the deed of trust. The statute evidently does not sanction such a view. It requires the filing of "a just and true account of the demand due * * * after all just credits have been given." R. S., sec. 3176. Of course, it is expected that "a just and true account" shall contain all the various items and dates that go to make it up, for this is the accustomed meaning of the words. If, after a lien filed, and dates given, it were allowable to introduce parol evidence to show that materials were furnished at an earlier or later date, as interest or lapse of memory

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might suggest or cause, the tenure of others interested in the land on which the lien is filed would certainly prove very precarious, and depend not upon a permanent record filed in the clerk's office, but upon extrinsic evidence. The view here expressed, as to the nature and requirements of such an account, is approved in the case of *McWilliams v. Allen*, 45 Mo. 573, where it is aptly remarked: "Where it is proposed to embarrass real estate with the encumbrance of a lien, it is no hardship to require of the lienors a statement of their demand, sufficiently precise and full to acquaint the owners, and all interested parties, with its nature and extent, with a specification of debit and credit. This was clearly the intent of the law giving the lien; and the provision is wholesome, and must be respected and carried out." From these premises I conclude that a lienor must stand or fall by the lien which he files, and the dates and items which he specifies, and is not at liberty to defeat or postpone a prior lienor or incumbrancer, by matter *in pais*.

VI. It is unnecessary to say anything more of the judgment *nunc pro tunc*, entered in the year 1878, long after the sale under the deed of trust, and without notice of any sort whatever, except that such amended entry could not affect Bunn, who purchased under the deed of trust. *McClanahan v. Smith*, 76 Mo. 428.

VII. And the sale, under the execution issued on the original judgment, was invalid, because it did not conform to such judgment, but to the one entered now for then in 1878. It follows, therefore, that defendant's title rests upon an execution with no judgment to support it.

VIII. Relative to the substitution of Coe as plaintiff in place of Bunn, there can be no objection to it, since the statute, in express terms, permits it to be done, R. S., 1879, sec. 3671. As plaintiff has not appealed, it need not be ruled whether he should have been allowed

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to recover for rents anterior to the execution of the deed from Bunn to him.

The judgment is affirmed. All concur, except as to paragraph three of this opinion, concerning which, no opinion is expressed but by Black, J., who dissents.

THE STATE *ex rel.* MAHAN *et al.*, Appellants, v. THE ST. LOUIS, KEOKUK & NORTHWESTERN RAILWAY COMPANY.

1. **Railroad, Construction of Upon Public Highway : STATUTE.** A railway company cannot, under the statute (G. S. 1865, p. 333 ; R. S., 1879, sec. 765), construct its road along or upon a public highway, except with the consent of the county court, and if it does so without such consent, a court of equity will interfere and grant the county appropriate relief.
2. ——— : ——— : LACHES. The profile and map of the route of the defendant company through the county was filed, as required by statute (G. S. 1865, p. 337), in the office of the clerk of the county court in April, 1878, and the present action to restrain the defendant from using the highway was instituted in January, 1882 ; *held*, there was no such delay on the part of the county as to preclude it from asserting its rights against the company.

Appeal from Hannibal Court of Common Pleas.—HON. THEODORE BRACE, Judge.

REVERSED.

T. H. Bacon for appellants.

(1) In sustaining the motion to dismiss the suit, because of the alleged failure to state a cause of action, the court erred, and the court also erred in overruling the motion for new trial and the motion in arrest of judg-

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ment. In such a case the only resort is a demurrer (R. S., sec. 3515), on decision of which the plaintiff may amend, of course. R. S., sec. 3518. (2) The statutes of 1865 forbade the construction of defendant's railroad on the public roads without the assent of the county court (G. S., 1865, ch. 63, p. 333, sec. 2, sub. 4, last clause), and according to the petition the railroad company of its own motion monopolized the public highways of Marion county, not only without the assent of the county court, but against its will and protest and hence a cause of action arose. *Troy v. Cheshire*, 3 Foster, 83, cited in 1 Redf. Railways, 1867 (3 Ed.) p. 277, sec. 76. (3) The construction of railroads on highways is specially subject to equitable control (2 Sto. Eq. Jur., 1861 (8 Ed.) sec. 1563), and the operation of a railroad in wrongful derogation of a highway being continuous in character, the plaintiff had a right to invoke the restraining power. *Springfield v. Connecticut*, 4 Cush. 63, cited in 1 Redf. Railw. *Ib.*, p. 305, sec. 76, note. The wrongful obstruction of a public highway always constitutes a public nuisance, affording cause for injunction. 2 Sto. Eq. Jur. *Ib.*, p. 99, sec. 921 to 924 *a*. (4) The boundaries of ways have relatively more extent and importance than the boundaries of any other subject matter of ownership; the boundary is nearly all there is of the way. On a question of confusion of boundaries of ways the owner of a way has no remedy in ejectment or in trespass *quære clausum fregit*. It is peculiarly the office of equity to settle such variances. Tyler on Boundaries, 1874, chapters 20, 21 and 22, pp. 224 to 281. And equity in such cases has power to grant a commission to set out boundaries. *Ib.* And a court of law has no such power. *Ib.* 253, citing *Attorney v. St. Aubin*, Wightwicks' R. 229. This commission is now mentioned as a survey. *Primm v. Raboteau*, 56 Mo. 407, 415 and 416. (5) The prosecuting attorney of Marion county, as relator

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had the right and the power to institute this action. (*State ex rel., etc., v. Saline Co.*, 51 Mo. 350, 363), and the county of Marion had a capacity to become plaintiff, (*supra*), and if any other party should have been plaintiff it was no ground for dismissal. *Butler v. Lawson*, 72 Mo. 227.

Anderson & Foreman and H. H. Trimble for respondent.

(1) The motion was, in reality, a demurrer, and, after the decision of the court on it, the appellant could have filed an amended petition, if he had so desired or had so asked. He cannot now complain of his own want of action in the court below. The record does not show that he was denied any right. *Austin v. Loring*, 63 Mo. 19. (2) The petition is multifarious, and sets out several causes of action at law, if all the allegations be accepted as true; one in ejectment, one in trespass, and one for obstructing the public highway, any one of which would give appellant an ample remedy at law. He cannot, under the allegations of such a petition, avail himself of a court of equity. (3) The appellant is not entitled to an injunction upon the facts set out in his petition, for it sets up the fact of the location, construction and operation of respondent's road on the line now complained of, years before the institution of this suit; such location and construction being made on a map and plat previously filed in the county clerk's office. The right to locate on the public highways was given by law, with assent of the county court. G. S., 1865, p. 333, sec. 2, sub. 4. Full notice to the county by such location, and acquiescence therein for years are conclusive assent. (4) The petition does not aver any insolvency on the part of the respondent, nor show that the damages to the appellant or the public are irreparable. The respondent's road is a public highway, and greatly

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used by the public, as shown by the petition. The public, therefore, represented by the appellant, is interested in respondent's road in the same sense as in the highway complained about. The only wrong then to the public is that the county roads have been impaired. Neither insolvency nor irreparable damage being pleaded, certainly there is no ground for equitable interference. *James v. Dixon*, 20 Mo. 79; *Echalcamp v. Schrader*, 45 Mo. 50. (5) If the petition be regarded as one for a mandamus, then it is not sufficient to entitle the appellant to that relief, because the petition does not concede any right of location or occupancy to the respondent, and, therefore, gives no reason or basis for any duty on the part of the respondent, which the respondent might otherwise owe to the public. No mandamus will lie unless there is a clear and specific duty, based upon a clear and specific right, as its necessary correlative. High on Injunctions (1 Ed.) sec. 10; Bouvier's Law Dict., Title, Mandamus.

HENRY, C. J.—The petition alleges substantially the incorporation of the Mississippi Valley Railroad Company and the Clarksville & Western Railway Company in 1871, and the incorporation, in 1873, of the Mississippi Valley & Western Railway Company, under the laws of this state, and the incorporation of the St. Louis, Keokuk & Northwestern Railway Company, in 1873, under and by virtue of the laws of the state of Iowa.

The consolidation of the two first named and other companies with the Mississippi Valley & Western Railway Company, and the acquisition by the latter of their franchises and subsequent acquisition by the defendant company of the franchises of the Mississippi Valley & Western Railway Company; that in September, 1872, the Mississippi Valley Railway Company, filed in the office of the clerk of the county court of

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Marion its location map and profile according to the statute, showing said railway, so located, as one hundred feet wide and with the road-bed and track thereon in the centre of said railway, the same being a route for a railway afterward adopted and used, as hereinafter described; and that, on April 8, 1878, the defendant company filed in the office of said county clerk its map of the location of the road-bed of its road through Marion county, but without showing the width of its railway, and this plat showed the location to be the same as that shown by the plat filed by the Mississippi Valley Railway Company in 1872. The petition then alleges that there were in said county of Marion three roads which, for a period of forty years, had been and were used as public county roads, upon parts of which the defendant's road was so constructed as to practically destroy them as public highways for ordinary travel, stating the particular manner in which this was done, which it is unnecessary to notice further than to say that the alleged obstructions sustain the general allegation.

It is further alleged that the occupation, use and enjoyment of said roads and adjoining grounds by the defendant was, and is, entirely without the assent of the county court of said county; and that, on the contrary, the said county court and county have often protested and do now protest against such usurpation. The prayer of the petition is for an injunction to restrain defendant from running its road and rolling-stock over said parts of said public roads and for general relief. A demurrer to the petition was sustained and from the judgment this appeal has been prosecuted.

The statute of 1865 authorized the construction of a railroad along or upon any public highway, but only with the consent of the county court. R. S., 1865, page 333, sec. 2. The petition alleges the filing of the plat or profile of its road by the defendant in April, 1878, and if there were nothing in the petition negating the con-

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sent of the county court, it might be presumed from its long silence; but the petition expressly avers, and it is repeated, that neither the court nor the county ever consented to, but remonstrated against, the occupation of the county roads by the defendant for its road. Whether the consent of the county court was obtained or not is a question of fact, and so far from it appearing on the face of the petition that such consent was obtained, the contrary was expressly averred. If such consent was not obtained the defendant had no right to construct its road upon the county roads, and there had not been such a delay on the part of the county to assert its right as to have precluded it from doing so when this suit was instituted. This suit was instituted in January, 1882, and defendant's profile of the road was filed in the county court in April, 1878, less than four years before the commencement of this suit. If the facts are as alleged in the petition, the plaintiff is entitled to some relief in equity. What it should be the court can determine on a hearing of the cause.

The judgment is reversed and the cause remanded.
All concur.

ANDERSON *et al.* v. MCPIKE, *Appellant.*

1. **Fraudulent Representations: EVIDENCE.** In an action for damages for fraudulent representations touching the financial condition of a third person, evidence of such representations to plaintiffs by defendant are admissible in evidence, if they were the means of inducing the plaintiffs to part with their property, as in that case there would be a fraud coupled with an injury.
2. —: **PRACTICE: INSTRUCTIONS.** In the trial of an action for damages for fraudulent representations touching the financial condition of a person, the jury should not be left to conjecture as to what are *material* false statements.

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3. **Land and Land Titles : TITLE BOND, SURRENDER OF.** The holder of a title bond to land, who surrenders, it to him who executed it, thereby obliterates whatever equitable right he may have theretofore had in the land.
4. **Evidence : ADMISSIONS OF ONE IN POSSESSION OF LAND.** The admissions of one, since deceased, respecting his title to land, made while in possession of the land, are competent evidence, even as against strangers.
5. **Title to Land : UNRECORDED TITLE BOND : NOTICE.** A purchaser of land for value, without notice of an unrecorded title bond, will take a clear title against any right growing out of such bond.
6. **Fraudulent Representations, Reliance Upon.** Where a party to whom fraudulent representations are made does not rely upon them, but seeks information from other quarters to verify the statements made, he cannot afterwards claim that a deceit has been practiced upon him by the party originally making the representations.
7. **— : BURDEN OF PROOF : PRESUMPTION.** If a party who has the means of information at hand makes the assertion that he relied on the statement of another, the burden is on him to establish the statement. For the law presumes that he who can see for himself, if he will but look, does look and find out for himself, and if he asserts the contrary, he cannot prevail without overcoming the presumption thus arising.
8. **Fraudulent Representation : KNOWLEDGE OF PERSON MAKING : PRESUMPTION.** Fraud is not established and relief will not in general be granted without proof that the party who made the fraudulent representation knew at the time it was false. The law raises no presumption of knowledge from the mere fact that the representation is false.
9. **False Assertion of Value : WARRANTY : OPINION.** A mere false assertion of value, where no warranty is intended, is no ground of relief to a purchaser, because such assertion is a mere matter of opinion, which does not imply knowledge and is a thing about which men may differ. Mere expression of judgment or opinion does not amount to warranty.
10. **Equity : PURCHASER WITH NOTICE UNDER PURCHASER WITHOUT NOTICE.** A purchaser with notice, from a *bona fide* purchaser for a valuable consideration without notice, is entitled to the same protection in equity against one seeking to overturn his title as the purchaser without notice.
11. **Admissions in Pleadings : EVIDENCE : PRESUMPTION, REBUTTAL**

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OF. *Prima facie* the original answer of a defendant in a cause is competent evidence against him. But the testimony of the attorney, whose name is signed to the answer, that defendant did not employ him in the cause, is sufficient to overthrow the presumption arising from his name being signed as defendant's attorney and to exclude the answer as evidence.

12. **False Representations : EVIDENCE.** In an action for damages for fraudulent representations in the sale of land between a purchaser under a deed of trust and his grantors, a deed from the grantor in the deed of trust to a third person, made after the purchase at the sale under the trust deed, and the subsequent sale by such purchaser, is irrelevant and inadmissible in evidence.
13. **Land, Purchase of : POSSESSION : VENDOR AND VENDEE.** Where the vendor of land, at the time of contracting, refuses to put the vendees in possession, and the conveyance is accepted on such terms, it is not the vendor's duty to put the vendees in possession.

Appeal from Macon Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED.

The following is the instruction mentioned in the opinion of the court.

"3. The court instructs the jury that the claim made by Means is not a valid one as against the plaintiffs, and cannot be enforced against them, unless the jury find, from the evidence in the case, that McPike, in making the purchase at the trustee's sale of said land made by J. B. Smith, bought the same for Modisett and not for himself, and it devolves upon the plaintiffs to show this by a preponderance of testimony, and if the plaintiffs have failed to do so, then the verdict of the jury should be for defendant on that issue, although the jury may believe from the testimony that Geo. F. Hatch, attorney for Means, gave notice to McPike, at the sale, of the existence of the bond, unless the jury further find that J. B. Smith had notice of Means' claim at the time he accepted the deed of trust from Modisett."

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D. H. McIntyre and W. H. Biggs for appellant.

(1) False representations by a vendor as to the value of the property sold cannot be made the basis of an action for deceit. The vendee has no right to rely on them. *Gordon v. Parmelee et al.*, 2 Allen (Mass.) 212; *Sanford v. Handy*, 23 Wend. 260; *Van Epps v. Harrison*, 5 Hill (N. Y.) 63; *Crank v. Cole*, 10 Ind. 485; Kerr on Fraud and Mistake, 82-88; 2 Kent Com., top. p. 486 (12 Ed.). (2) The court committed error in permitting Reuben Anderson to testify as to appellant's declarations and statements when the parties had met for the purpose of effecting a compromise. 1 Greenl. Evid. (12 Ed.) sec. 192; *Williams v. Thorp*, 8 Cow. (N. Y.) 201. (3) The court should have sustained appellant's objection to the reading in evidence of the title bond from Modisett to Means, dated March, 1866. *Fox v. Hall*, 74 Mo. 315. (4) The court erred in permitting the respondents to read in evidence quit-claim deed from Modisett to Means, dated June 26, 1876. *Hone v. Van Winkle*, 3 C. E. Green (N. J.) 495. (5) There should have been no testimony admitted in regard to representations by appellant as to the financial condition of Modisett, or the value of his property and the amount of his indebtedness. *Arthur v. Barrows*, 41 Conn. 287; *Wellington v. Small*, 3 Cush. 145. (6) The paper purporting to be the first or original answer of defendant and signed by George W. Foster, attorney, should not have been read in testimony against the defendant, without first proving that the attorney signing the answer had authority so to do, or had been employed in the case by defendant. Foster was not attorney of record for defendant, except so far as shown by this paper. *Sone v. Palmer*, 28 Mo. 539; *Foster v. Wiley*, 27 Mich. 244; *Weiland v. White*, 109 Mass. 392. The statement in the paper that defendant bought the land at trustee's sale for Modisett,

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was prejudicial to defendant's case. (7) The third instruction asked by appellant and refused by the court, properly declared the law. *Hill v. Paul*, 8 Mo. side p. 482; *Helm v. Logan's Heirs*, 4 Bibb (Ky.) 78.

Thos. J. C. Fagg for respondents.

(1) The court committed no error in permitting plaintiffs to prove representations of defendant as to the amount of property owned by Modisett and his ability to pay his debts, and as to the condition and value of the lands he conveyed to them. *Vernon v. Keys*, 12 East, 632. (2) The court committed no error in permitting Reuben Anderson to testify to defendant's declarations at the time they made an effort to compromise. 1 Greenl. on Evid., sec. 192. and cases cited; *Snow v. Batchelor*, 8 Cush. 513. (3) There was no error in admitting in evidence the title bond from Modisett to Means. *Fellows v. Wise*, 55 Mo. 413. (4) The court committed no error in allowing plaintiffs to read the original answer filed by defendant in this cause. 58 Mo. 75; Weeks on Attorneys, sec. 185. (5) The instructions properly declared the law, and, upon the whole, placed the case before the jury very favorably to defendant. The instructions asked by defendant and refused were manifestly erroneous. If plaintiffs were deceived by false statements and sustained damages, they had their election to rescind or sue for damages. *Owens v. Rector*, 44 Mo. 389. (6) There was no misjoinder. See Bliss on Code Pleading, sec. 411. Not having demurred to the petition it must be treated as having been waived. *Russell et al. v. Defrance*, 39 Mo. 506; *Kerr v. Bell*, 44 Mo. 120; 68 Mo. 454; 50 Mo. 158.

SHERWOOD, J.—Plaintiffs brought this action for damages based upon false representations charged to have been made to them by defendant, in effecting a sale to them of a farm in Ralls county, in February, 1873.

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The false representations are alleged to consist in statements made by the defendant as to the quality, title, and value of the land thus sold to them, as well as to Modisett's financial condition, whereby plaintiffs were induced to accept the farm and to surrender notes held by them against Modisett, whom the petition alleged was perfectly solvent, had abundant property to pay all of his debts, and that plaintiffs could easily have compelled payment of said notes, but, being ignorant of the facts, were deceived by defendant, on whose fraudulent representations they relied. The petition thus contained three elements as bases of recovery: (1) False representations as to Modisett's financial condition. (2) As to the value of the land. (3) As to the title.

I. On the first point, evidence touching fraudulent representations made by defendant as to Modisett's financial condition was admissible if they were the means of inducing plaintiffs to surrender their notes to defendant. If it was true that such representations were made and induced that result, then an action on the case would lie, as there would be fraud, coupled with injury, and it would resemble, in this respect, cases where fraudulent acts or representations were successful in defeating a judgment or attachment lien, such lien being regarded as a vested or specific right, an injury thereto capable of being definitely ascertained and estimated. Cases, therefore, cited by counsel respecting fraudulent acts or representations as to a debtor's financial condition, in consequence of which creditors failed to secure a lien on his property and thereby lost their debts, are obviously inapplicable in the present case; for here, there was a loss, if it be true that such misrepresentations were in truth and in fact made and resulted in the way stated. But it is by no means clear that any such false representations were made by defendant. An examination of the testimony induces the belief that there was no evidence on this

point. If this be true, then that element was eliminated from the case and should not have been submitted to the jury, and even if there were testimony on the point mentioned it was improper to leave the jury to conjecture as to what were "*material* false statements."

II. (a) Relative to false representations as to the title of the land, if the testimony of Foster is to be credited, and it stands undisputed on the record, Means had no title whatever in the land sold by defendant to plaintiffs, as Means, according to Foster's testimony, in 1869 or 1870, surrendered to him the title bond executed to him by Modisett and instructed Foster to give the bond to Modisett. This act of Means obliterated whatever equitable right he theretofore may have had in the premises, for it cannot be doubted from the fact of its surrender that such an effect was intended. (b) And the admissions of Means while in possession of the land, he having since deceased, were competent evidence, even as against strangers. 1 Wharton on Evidence, section 237, and case cited; 2 *Id.*, section 1156. And it is said not to be necessary as a condition of admissibility that the declarant should be dead, though the better view is to restrict the admissibility of living predecessors in suits against strangers to cases where such declarations are part of the *res gesta*. 1 Greenl. Evid., sec. 109. On this account, the testimony of Foster as to what Means swore, respecting his title at that time, he being then in possession of the land, was admissible. (c) Furthermore, it is difficult to see how there could be any failure of title to the land in any event, as plaintiffs, according to their own testimony, were purchasers, for value, without notice of the title bond, and, therefore, if this was the case, would take a clear title against any right growing out of the title bond, since that was not of record. *Fox v. Hall*, 74 Mo. 315.

III. (a) Concerning the fraudulent representations said to have been made by defendant respecting the

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quality or value of the land, the testimony of Anderson seems to exonerate him from this charge. And the testimony appears to greatly preponderate in favor of the view that defendant did not make any fraudulent representations respecting the value of the land, but that he expressly referred plaintiffs, for information on the subject, to Biggs, and that Anderson went to Biggs and obtained information all about the land, and afterwards communicated that information to Schooler. It is held that, even if fraudulent representations are made respecting a given subject, and the party to whom the representations are made does not rely upon such representations, but seeks from other quarters to verify the statements made, he cannot afterwards claim that a deceit has been practiced upon him by the party originally making the misrepresentations. Bigelow on Fraud, 87, and cases cited. (b) And if the party who had the means of information at hand, make assertion that he relied on the statement of another, the burden is on him to establish the statement. (c) For the law presumes that persons who can see for themselves, if they will but look, do look and find out for themselves, and if they assert the contrary of this, they cannot prevail without overcoming the presumption thus arising. *Id.* 70. (d) And "fraud is not established, and redress or relief will not in general be granted, without proof that the party who made the false representation knew at the time it was false. The law raises no presumption of knowledge from the mere fact that the representation is false." *Id.* 57. (e) It is equally clear that "a mere false assertion of value, where no warranty is intended, is no ground of relief to a purchaser, because the assertion is a matter of opinion which does not imply knowledge, and in which men may differ; mere expression of judgment or opinion does not amount to warranty. Every person reposes at his peril in the opinion of others, when he has equal opportunity to form and exercise his own judgment—*simplex commen-*

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datio non obligat." 2 Kent, 486. If defendant did, in fact, refer the plaintiffs to Biggs for information as to the value of the farm, and that information was obtained by them from Biggs, defendant's statements of the value of the farm, if made in that connection, should only be regarded as expressions of opinion.

IV. The third instruction asked by the defendant should have been given. If Smith was an innocent mortgagee, and Means, who was in possession of the land at the time, informed him that he was only a tenant of Modisett's, and on faith of this statement he loaned his money, he was entitled to protection as an innocent purchaser, and if defendant bought the land for himself, as he testifies, and not as the agent of Modisett, then, clearly, McPike must stand in Smith's shoes, or else it might happen that Smith would have an unmarketable title on his hands. 2 Story Eq. Jur., sec. 1503 *a*.

V. *Prima facie* the original answer of defendant was competent evidence against defendant. Weeks on Attorneys, sec. 185; *Dowzelot v. Rawlings*, 58 Mo. 75. But the testimony of Foster, that defendant did not employ him in the cause, was sufficient to overthrow the presumption arising from his name being signed to the answer as the attorney of defendant, and to exclude the answer from consideration by the jury.

VI. The deed made by Modisett to Means in 1876, was clearly inadmissible and had no bearing or relevancy to the case, no more than would have been a written statement by Modisett to Means, that the latter was the real owner of the land. The rights of parties litigant can not be prejudiced in this way.

VII. It stands admitted in evidence that defendant, at the time of contracting, refused to put plaintiffs in possession of the farm sold them. By accepting the conveyance on such terms, it was no part of defendant's duty to put Means out of possession and to put plaintiffs in possession. Besides, Modisett proffered to put

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plaintiffs in possession, and the proffer was declined. Plaintiffs should certainly not have both the money and the land, and their recovery in the lower court amounted to about the amount of the notes.

The judgment should be reversed and the cause remanded. All concur.

RENFRO V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Master and Servant :** RISKS ASSUMED BY SERVANT : NEGLIGENCE. A servant assumes the ordinary and natural risks incident to the service in which he engages, and the master is not liable for the servant's want of care.
2. **The evidence** in this case examined, and the accident, which resulted in the death of plaintiff's husband, who was in defendant's service, held to have been attributable to the risks incident to the business in which the deceased was engaged, coupled with the want of care on the part of himself and a fellow servant.

Appeal from Grundy Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED.

M. A. Low for appellant.

(1) The dangers to be apprehended from repairing cars on tracks used for making up trains, were open and obvious. They were as patent to Renfro as to Best, consequently all such hazards were assumed by the former. *Cagney v. Ry. Co.*, 69 Mo. 416; *Smith v. Ry. Co.*, 69 Mo. 32. (2) Having acquiesced in defendant's customary mode of doing the business, neither Renfro, nor those claiming through him, had the right to complain that it was not the proper way to do it. By acquiescing in it

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he made it his way. He had no right to demand that the company should exercise more care for his safety than he exercised for himself. *Priestly v. Fowler*, 3 M. & W. 1; *I. B. & W. R. Co. v. Flanigan*, 77 Ill. 365; *Penna. Co. v. Lynch*, 90 Ill. 333; *Baylor v. Ry. Co.*, 11 Vroom, 23; *Dillon v. U. P. Ry. Co.*, 3 Dill, 319; *Hughes v. Ry. Co.*, 27 Minn. 137; *Sweeney v. Ry. Co.*, 57 Cal. 15; *Porter v. Ry. Co.*, 71 Mo. 67. (3) Best was not a superintendent. He was a mere foreman. He had power to hire and discharge car repairers. In respect to that duty he was a vice-principal; but he is not charged with any neglect of duty in employing and discharging hands. A foreman is the fellow servant of the men engaged in working under his directions. *O'Conner v. Roberts*, 120 Mass. 419; *McCosker v. Ry. Co.*, 84 N. Y. 77; *Zeigler v. Day*, 123 Mass. 152; *Holden v. Ry. Co.*, 129 Mass. 268; *Beaulieu v. Ry. Co.*, 48 Me. 291; *Gallagher v. Piper*, 16 C. B. (N. S.) 669, 694; *Wilson v. Merry*, L. R. 1 Scotch App. 326; *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 62; *Brown v. Ry. Co.*, 27 Minn. 162; *Hoke v. Ry. Co.*, 11 Mo. App. 575. (4) The court erred in giving plaintiff's fourth instruction. The circumstances connected with the fatal injury should not have been considered in estimating the damages. A railway company is not liable in punitive damages in such a case. *Steinbach v. Winfrey*, — Mo. —; *Morgan v. Durfee*, 69 Mo. 469; *Porter v. H. & St. J. Ry. Co.*, 71 Mo. 66; *Cleghorn v. N. Y. C. & H. R. Ry. Co.*, 56 N. Y. 44.

R. A. Debolt for respondent.

(1) It was sufficient to charge that Best, the agent of defendant, ordered the deceased to repair a car in a place which he knew to be dangerous. *Mack v. Railroad*, 77 Mo. 234; *Schneider v. Railroad*, 75 Mo. 293. (2) The evidence fails to show that the danger on the occasion of the injury was any more obvious or likely to occur than on any former occasion. The deceased had been ordered

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by his superior, Best, the agent of the company, to repair the crippled car on track number two, Best knowing the danger to which he would be subjected, and in obeying he had the right to rely for his safety on the supposed superior judgment of Best, who gave the order and continue in the work as usual. "It cannot be said" that in so doing "he was guilty of contributory negligence in pursuing his labor when hurt." *Flynn v. K. C., St. Jo. & C. B. Ry. Co.*, 78 Mo. 195, 209, 210; *Ford v. Fitchbury Ry. Co.*, 110 Mass. 240, 255; *Lewis v. St. L. & I. M. Ry. Co.*, 59 Mo. 495; *Conroy v. Vulcan Iron Works*, 62 Mo. 38, 39; *Keegan v. Kavanaugh*, 62 Mo. 230; *Snow v. Housatonic Ry. Co.*, 8 Allen, 450; *Fernandes v. Sac City Ry. Co.*, 52 Cal. 49, directly in point; also, 65 Mo. 521. (3) It is the duty of an employer to provide a safe place for his employes while at work. *Whalen v. Centenary Church*, 62 Mo. 328; *Keegan v. Kavanaugh*, 62 Mo. 232. (4) Although the deceased may have been guilty of negligence in working in a dangerous place without a watch, yet, it was gross negligence on the part of Hoke, after knowing the danger to which the deceased had exposed himself, to permit the switchman under his control to shove the cars in from the north, through which the injury was caused. Hoke's negligence was subsequent to that of deceased, and he knew of the danger of deceased a sufficient time to have avoided the injury by simply preventing the engine and men from going to the north end of the track. *Rains v. Railroad*, 71 Mo. 167; *Strauss v. Railroad*, 75 Mo. 185; *Isabel v. Railroad*, 60 Mo. 482; *Maher v. Railroad*, 64 Mo. 267. (5) Instructions numbered one and two, given for plaintiff, were proper. *Brothers v. Carter*, 52 Mo. 374; *Gormly v. Vulcan Iron Works*, 61 Mo. 494; *Harper v. Railroad*, 47 Mo. 579. (6) The deceased was not a fellow servant of Best, nor of Hoke. *McDermott v. Railroad*, 74 Mo. 13; *Hall v. Railroad*, 74 Mo. 298; *Long v. Railroad*, 65 Mo. 225; *Porter v. Railroad*, 71 Mo. 77. (7) Where a

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superintendent of a defendant has entire control over the work, and the laborers engaged in it, the defendant is liable for injuries to the employes, occurring through the negligence of such superintendent. *Lewis v. St. L. & I. M. Ry. Co.*, 59 Mo. 495; *Whalen v. The Centenary Church of St. Louis*, 62 Mo. 326; *Cook v. The Han. & St. Jo. Ry. Co.*, 63 Mo. 397. (8) Before defendant can charge that deceased was negligent in not complying with defendant's rules in doing its work, it must show that he knew of such rules, and this it has failed to do. No witness testified that he knew of such rules. *A., T. & S. F. Ry. v. Plunkett*, 25 Kas. 195. (9) The question of negligence is one of fact for the jury, and was, in this case, fairly submitted to them on the instructions, and the finding, which was for the plaintiff, should not be disturbed. *Harper v. Ry. Co.*, 47 Mo. 576; *Stoddard v. Railroad*, 65 Mo. 521; *Smith v. Railroad*, 61 Mo. 591, 592; *Buesching v. The St. L. Gaslight Co.*, 73 Mo. 233; *Barton v. Railroad*, 52 Mo. 253; *Flynn v. Railroad*, 78 Mo. 211; *Hoyt v. Hudson*, 22 Am. Rep. 719; *Fernandes v. Sac City Ry. Co.*, 52 Cal. 49, 50, 51, 52; *Brown v. Railroad*, 50 Mo. 466.

BLACK, J.—The plaintiff's husband was in the employ of defendant, as car repairer, at its yards in Trenton. While thus engaged he was run over and injured, from which he died. This is a suit for damages therefor. The petition alleges that defendant's servants, having in charge repairing of cars, negligently directed Renfro to repair a car standing on track number two, and while obeying this order, defendant's servants carelessly backed, or run, a train of cars over him. Six witnesses, five of whom were car repairers, and one a fireman, all engaged, at the time, in the yards, testified in behalf of plaintiff. Their testimony is all that was offered. Whether this evidence made out a *prima facie* case is the real question for consideration.

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There was a track in the yards running north and south, designated as number two. West of this, and in the western part of the yards, was a repair track. The evidence, also, shows that Best was foreman of the car repairers, and had charge of that work. Hoke was yard master, and had charge of making up trains, handling cars in the yards, and control of the switchmen. Winters and Sires, car repairers, were at work on the caboose track, when the former and deceased went from there to fix a car, the location of which is not given. They could not fix this car where it was, and they directed a switchman to set it on the repair track. Best, the foreman, then directed Winters and the deceased to repair a crippled car on track number two. They then left Best near the shops and went a hundred, or one hundred and fifty yards to the car to be repaired. It does not appear where Best was at the time of the accident.

Winters alone gives an account of what transpired at that place. It is as follows:

"I went under the car and was at work fixing it, while Renfro stood beside the car, watching. The yardmen shoved in a car on the south end of track number two. A colored boy was on the car, and some one said, 'stop it,' and he did so. Renfro then got under the crippled car with me, and we both went to work to fix it. I do not know which way the men went after shoving in the car on the south end of number two. Daniel Hoke was yard master, and was on duty at the time. We saw him from fifty to one hundred yards south of us when the car was set in on track number two. I do not know what he did, or where he went, after that. I did not see him any more until after the accident. Some time after that, some cars were shoved in from the north upon track number two, without any warning to us, and while we were still at work under the car fixing the drawhead, which was out of order. The cars ran against the car we were still at work under, and caused it to run

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over Renfro, inflicting injuries from which he died the same day. There were ten or twelve cars coupled to, and north of that, under which we were at work at the time of the injury. We kept watch until a car was put in on south end of track. We then thought Hoke saw us, and went to work without a watch. The rules required us to flag or watch. We did not tell the yardmen we were going to work on this car. We knew Hoke saw us when the car was set in on the south end. Renfro was then standing by the car, where he could not help seeing him. I was under the car at the time. The rules required us to tell the yard master and crew when we went under the cars to repair them. We did not do so this time. Yerian was near the car which was set in from the north, and as soon as I saw the car I gave him the signal to stop, but it was too late. It was a dangerous place to work. It was the custom for us to work repairing cars in all parts of the yard. Where the repairs required were slight, cars were not set on repair track. Track number two was used for making up trains, and was in constant use. We put out no flag when we went to work under the car, and had no watch out at the time of the accident. There was but one flag in the yard at the time, and it was in use at the lower end of the yard. No flag or guard was furnished us. We did not ask Best for a flag, nor for a guard."

Another of these witnesses stated: "We had orders to put out flag, or to keep a watchman, when repairing cars off the repair track;" and another, that "there was a general order from Best that when two went out without a flag, and it took both to do the work, to call for a third man. A third man was never refused." There was other evidence to the effect that the flag was in use at the time of the accident, and that Best and Hoke each had entire control of the work and men in their respective departments.

Now, Best, in giving the order to repair the car, only

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directed the deceased and Winters to do that which was a part of their general work. This work to be done was no more hazardous than that daily performed. Reasonable rules were prescribed for the safety of the men, which were not obeyed. It is contended that there is no evidence that deceased knew of these rules, but this is clearly untenable. Express evidence is that there was a general order when two went to work and it took both to do the work, to call for a third. The witnesses all speak of these rules, and the deceased did watch so long as there was any immediate danger from the south end of the track. When the cars were put in on the south end of the track, deceased and Winters saw Hoke, who was to the south of them, and it may be fairly inferred that he saw them, for Renfro was then on watch at the side of the car. Twenty or twenty-five minutes later, the same switch engine was at work at the north end of the track, with ten or twelve cars between it and deceased, and then the accident occurred. It does not appear where Hoke was at this time, but it may be inferred that he was with the engine and its crew. Without keeping further watch, or giving notice to any one, deceased and Winters both went under the car, out of sight of the train men. If Hoke, or he and the train men are to be charged with any negligence, it is because, from the previous circumstance of seeing deceased on watch, they knew, or ought to have known, that deceased and Winters were under the car.

The train men, in the discharge of their duties, might well rely upon the customs of the yard. The disappearance of deceased, in the light of the rules and custom, would lead to the conclusion that the car repairers had left, nothing further appearing. There is no evidence to show that Hoke knew the character or extent of the work to be done on this crippled car, and from which he might reasonably infer how long it would take them to do the work.

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We must hold there is no evidence to charge Hoke with negligence. On the facts disclosed, Hoke and Best are to be regarded as vice-principals, and not as fellow servants with the men under their respective management. We have assumed, for the purposes of this case, that the men engaged in the two departments were so far separated that those in the one should not be regarded as fellow servants with those in the others. Citation of authorities is not necessary to show that the servant assumes the ordinary and natural risks incident to the service in which he engages, nor is the master liable for the servant's own want of care.

Giving to the evidence in this case every intendment which it will bear in favor of the plaintiff, we are all agreed that the accident must be attributed to the risks incident to the business in which deceased was engaged, coupled with want of care on the part of himself and Winters, who was, beyond doubt, a fellow servant.

The judgment should be reversed. It is so ordered. All concur.

THE STATE V. ANDERSON *et al.*, *Appellants*.

1. **Criminal Practice: MURDER: INSTRUCTION.** On a trial for murder, an instruction is not erroneous which tells the jury that if they believe the defendants guilty of murder in the first or second degrees, but have a doubt as to which degree, they will give them the benefit of such doubt, and convict of the lesser degree.
2. —: **INSTRUCTION.** An instruction held not erroneous because it did not confine the belief of the jury to the evidence, they having been sworn to try the case on the evidence, and it appearing they could not possibly have supposed they were permitted by the instruction to base their verdict upon anything but the testimony in the case.
3. **Criminal Law:** One may bring on a difficulty and follow it up in a manner which will not justify the other party in killing him.

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4. **Criminal Practice: DEFENDANT TESTIFYING.** A defendant who has testified is entitled to have instructions predicated on the facts sworn to by him just as if he were a disinterested witness.
5. ——— : **TRANSCRIPT OF BILL OF EXCEPTIONS.** The clerk of the trial court in making a transcript of the bill of exceptions cannot insert instructions not contained in nor called for by such bill.
6. **Practice in Supreme Court: CERTIORARI.** A transcript certified to the Supreme Court in return to a writ of *certiorari*, supersedes the one previously filed, and the latter cannot be regarded in determining the cause.
7. ——— : **BILL OF EXCEPTIONS: INSTRUCTIONS.** The Supreme Court will not presume that proper instructions were given by the trial court for the defendant, where the bill of exceptions only discloses that instructions were given for the state, and that others were asked for by defendant and refused.
8. **The Evidence** in this case held not to authorize an instruction for any degree of manslaughter.

Appeal from Carroll Circuit Court.—HON. JAMES M. DAVIS, Judge.

REVERSED.

W. M. Eads and L. H. Waters for appellants.

(1) The court erred in giving several of the state's instructions. (a) The first and second instructions do not properly define the different degrees of murder, there was no evidence tending to show that Baugh was present, assisting Anderson in killing Rea. (b) The third instruction authorized a conviction, although the jury entertained a doubt as to the degree of the offence committed. (c) The fourth instruction told the jury that if they believed beyond a reasonable doubt that Anderson was guilty, etc. Their belief should have been confined to the evidence. (d) The eighth instruction told the jury that they must consider whatever defendants have said since the shooting, in relation thereto, "all together." This instruction assumes that defendants were so connected with the

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killing that each was bound by what the other said. (2) The court erred in refusing defendants' instructions marked *a*, *b*, *c* and *d*, in the bill of exceptions. (*a*) The court should have instructed the jury that if they entertained a doubt as to whether Anderson, in killing Rea, acted maliciously, or in self-defence, he could not be convicted. (*b*) The court erred in refusing to instruct the jury that if Rea brought on a difficulty, and in following it up was killed, that such killing was not murder. (*c*) The defendants had a right to defend not only their persons, but their cabin. (3) The court will not consider any instructions or motions unless they are set out in the bill of exceptions. *Collins et al. v. Barding*, 65 Mo. 456; *State to use, etc., v. Eldridge*, 65 Mo. 584; *State v. Shehane*, 25 Mo. 565. The case to be tried is that made by the records. The court will neither assume that there was evidence authorizing an instruction given, nor that such instructions were given as the evidence would warrant. (4) It seems to us that the court, on reading the evidence, must conclude that the verdict is wrong. There is a grave doubt if defendants are guilty of murder in the second degree, and the sentence is cruel and unusual. (5) The conviction of Baugh was not authorized under the evidence.

Shewalter & Sebree also for appellants.

(1) The court, of its own motion, should have instructed as to manslaughter. *State v. Banks*, 73 Mo. 597; *State v. Robinson*, 73 Mo. 308; *State v. Edwards*, 71 Mo. 324; *State v. Hill*, 69 Mo. 452; *State v. Branstetter*, 65 Mo. 152. (2) The instruction numbered two given for the state is fatally defective in failing to use the word "feloniously." R. S., secs. 1232-3. (3) The fourth instruction given on behalf of the state is likewise erroneous. *State v. Ross*, 29 Mo. 40; 1 Bishop C.

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P., sec. 546. (4) The trial court committed error in failing to define the word "feloniously."

B. G. Boone, Attorney General, and *J. L. Peak* for the state.

(1) The indictment is properly drawn. Both defendants are charged as principals in making the assault—Anderson as the immediate perpetrator of the crime, and Baugh as present aiding and abetting. It is not material which one is charged with having inflicted the fatal wound. Both are principals, and the law imputes the injury given by one as the act of the other. *State v. Dalton*, 27 Mo. 13; *State v. Ross*, 29 Mo. 32; *State v. Davis*, 29 Mo. 391. The instructions given on behalf of the state present the case fully and fairly. The first instruction is a plain and clear statement of the law as to murder in the first degree. The evidence justified the instruction. *Green v. State*, 13 Mo. 382; *State v. Jennings*, 18 Mo. 435; *State v. Ross*, 24 Mo. 483; *State v. Hollenscheit*, 61 Mo. 302; *State v. Foster*, 61 Mo. 549. The second instruction properly defines murder in the second degree, and there was evidence to support it. *State v. Underwood*, 57 Mo. 40; *State v. Lane*, 64 Mo. 319; *State v. Peak*, 85 Mo. 190. It was unnecessary in defining murder in the second degree, that the meaning of "feloniously" should be explained. This word is not an element of crime, but is only used in classifying offences. It is only where words constitute distinct elements of crime, and are technical, that they need be defined. *State v. Snell*, 78 Mo. 240. The evidence in this case might properly have been applied to either murder in the first or second degree. *State v. Lane*, 61 Mo. 319, and cases cited. The degree was a question for the jury to determine from all the facts in evidence. *State v. Foster*, 61 Mo. 549. The fourth instruction was proper. 2 Bish Cr. Pro. (3 Ed.) sec. 7, and authorities cited; *State v. Hollenscheit*, 61 Mo. 308; *State v. Miller*,

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70 Mo. 604. The technical words constituting the elements of the crime charged are properly defined in the fifth instruction. *State v. Weiners*, 66 Mo. 13; *State v. Banks*, 73 Mo. 592; *State v. Kotovsky*, 74 Mo. 247. The sixth instruction, defining a reasonable doubt, has been repeatedly approved by this court from 1857, *State v. Nueslein*, 25 Mo. 111, to 1883, *State v. Jones*, 78 Mo. 282. The seventh instruction in regard to self-defence has, under a similar state of facts, uniformly been approved by this court. *State v. Starr*, 38 Mo. 270; *State v. Linney*, 52 Mo. 40; *State v. Underwood*, 57 Mo. 50. The eighth instruction in regard to admissions has been sanctioned by this court. *State v. Carlisle*, 57 Mo. 102; *State v. Hill*, 65 Mo. 84. The ninth instruction in regard to the admissions of one defendant not affecting or binding the other was correct. *State v. Daubert*, 42 Mo. 239; *State v. Duncan*, 64 Mo. 262; *State v. Reed & Fredericks*, 85 Mo. 145. The tenth instruction as to the credibility of witnesses, and the eleventh, as to defendant's testimony, demeanor on the stand, etc., have been sanctioned so often by this court as not to require the citation of authorities to prove their correctness. (2) The trial court was not authorized to give an instruction for manslaughter in any degree. The evidence showed that the offence was either murder in the first or second degree, or self-defence. *State v. Kilgore*, 70 Mo. 547; *State v. Ellis*, 74 Mo. 207; *State v. Johnson*, 76 Mo. 121; *State v. Snell*, 78 Mo. 240; *State v. Jones*, 79 Mo. 441. Courts, in the trial of defendants charged with murder, should not instruct as to manslaughter, unless there is evidence to support such instructions. *State v. Edwards*, 71 Mo. 312. The uncontradicted testimony was that the homicide was intentional and committed with a deadly weapon. Under this state of facts it would have been error for the court to have instructed other than it did. *State v. Alexander*, 66 Mo. 148. (3) Several instructions were asked by defendants. Those marked A, B, C, and

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D, respectively, having been refused, while a number of others, not presented in the return to the *certiorari*, but appearing in the first transcript, were given. The ones refused are not specifically mentioned in the motion for a new trial. This court will not review matters of exception not brought to its attention by a motion for a new trial; nor will it review mere matters of exception to which no objection was made in the progress of the trial, although attention is called to them in the motion for a new trial. *State v. Ray*, 53 Mo. 345; *State v. Pints*, 64 Mo. 318; *State v. Williams*, 77 Mo. 310; *State v. McDonald*, 85 Mo. 539. When it clearly appears that other instructions than those preserved were given, the presumption is, that the court properly instructed the jury. If the party appealing does not bring up the full record, the Supreme Court will infer that the action of the lower court was proper as to matters omitted. *State v. Tucker*, 84 Mo. 23; *Birney v. Sharp*, 78 Mo. 73; *Greenbaum v. Millsaps*, 77 Mo. 474; *Goode v. Crow*, 51 Mo. 212; *State v. Sullivan*, 51 Mo. 522. (4) There is no merit in the objection that defendants were not afforded an opportunity to challenge the array of the grand jury which found the indictment. Such exceptions, when tenable, come too late when made for the first time on a motion for a new trial. *State v. Marshall*, 36 Mo. 400; *State v. Connell*, 49 Mo. 282; *State v. Arnold*, 55 Mo. 89, and cases cited. Defendants cannot object to the composition or organization of the grand jury. R. S., 1879, sec. 1772; *State v. Pitt*, 58 Mo. 556; *State v. Breen*, 59 Mo. 413; *State v. Jones*, 61 Mo. 232; *State v. Hart*, 66 Mo. 208; *State v. Pate*, 67 Mo. 488. The court will not interfere with a verdict on the ground that it is against the weight of evidence.

HENRY, C. J.—The defendants were indicted in the Carroll circuit court for the murder of John Rea, and, on a trial, were convicted of murder in the second degree

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at the April term, 1885, of said court, and from the judgment have appealed to this court.

The defendant Baugh and Rea had occupied a cabin together, but had a difficulty, which resulted in their separation, Rea leaving Baugh in possession of the cabin and of some furniture belonging to Rea. Baugh had made threats that if Rea ever came back to the cabin he "would stop him at the door." To another witness, that if Rea ever came to his house, "he would never get away alive." On the morning of the eighth of April, 1884, Baugh went over to see Anderson, who is his cousin, and who was sick, and asked him to go home with him. There is evidence tending to prove that Baugh expected Rea to come to his cabin that afternoon for his goods. Anderson accompanied Baugh home, and about six o'clock that afternoon, Rea went to the cabin and was killed near and in front of the cabin door by the defendant Anderson.

The testimony of Anderson and Baugh, if true, made a clear case of self-defence. It was to the effect that Rea came and knocked at the door of the cabin, and was asked by Baugh who it was, and, answering, was told by Baugh that there had been strife between them and he did not wish him to come into the cabin, but Anderson said let him come in, and thereupon Rea entered and commenced cutting Baugh with a knife, who ran out of the cabin followed by Rea, and when Anderson went to the door, he turned back and commenced firing upon Anderson, who got a gun from a rack near the door and shot him.

The following instructions given for the state are complained of:

"3. If the jury believe from all the evidence in the case, beyond a reasonable doubt, that the defendants are guilty of murder in the first degree or second degree, as these offences have been defined in these instructions, *but have a doubt as to the degree of offence* of which the

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defendants are guilty, the jury will give them the benefit of such doubt, and find them guilty of the less offence."

"4. If the jury believe, beyond a reasonable doubt, that the defendant Anderson is guilty of either degree of murder, as defined by these instructions, but entertaining a reasonable doubt as to the guilt of defendant Baugh, then they may convict the said Anderson and acquit the said Baugh."

"8. In considering what the defendants have said since the fatal shooting, if you find they have said anything in relation thereto, you should consider *it all together*. They are entitled to the benefit of what they said for themselves, if true, as the state is entitled to the benefit of what they said against themselves in any conversation of defendants proved by the state. What they said against themselves the law presumes to be true because against themselves; but what they said for themselves you are not bound to believe because said in a conversation proved by the state. You may believe it or disbelieve it, as it may be shown to be true or false by all the evidence in the case."

It is objected to the first of the above instructions, that it permitted a conviction for murder in the second degree, if the jury, believing them guilty of murder, had a doubt as to the degree of murder of which they were guilty. If the evidence satisfied the jury, beyond a reasonable doubt, that defendants intentionally and maliciously killed Rea, and the only doubt they had was, whether it was done with the deliberation necessary to constitute the homicide murder in the first degree, but having none whatever that it was committed with the premeditation, which made the crime murder in the second degree, it was their duty, as the court instructed, to find them guilty of the latter crime. Can it be that it was the duty of the jury, so believing from the evidence, to acquit the defendants? Certainly not.

Nor do we see any objection to the second instruc-

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tion, which declared that if, beyond a reasonable doubt, the jury believed Anderson guilty of murder in either degree, but had a reasonable doubt of Baugh's guilt, they might convict Anderson and acquit Baugh. Counsel contend that it is erroneous, in not having confined the belief of the jury to the evidence; but they were sworn to try the cause on the evidence, and could not possibly have supposed that they were permitted, by this instruction, to base their verdict upon anything but the testimony in the cause. Objection is made to the third instruction, that the jury were told that they must consider whatever defendants had said, since the shooting, in relation thereto, all together, thus permitting what one said to prejudice the other. While such a construction might be placed upon the instruction, considered by itself, yet the court, in an instruction immediately following it, told the jury distinctly that the statements made by either of the defendants were only binding upon him who made them.

The following instructions asked by defendants were refused:

"1. If, after considering all the evidence in the case, the jury shall entertain a reasonable doubt as to whether defendant Anderson, in killing John Rea, acted maliciously or in self-defence, then the jury can not convict him."

"2. The court instructs the jury that if John Rea went to the house of defendant Baugh, and brought on a difficulty with the defendant, and in following up such difficulty was shot and killed by defendant Anderson, then the defendant Anderson, in killing said Rea, is not guilty of murder in either degree."

"3. The jury are instructed that Anderson had the right to go to the cabin of Laurel Baugh along with him and to stay all night with him; and that if Anderson had lain down on the bed, and Baugh had closed the door, the deceased came to the cabin and asked ad-

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mittance, and the door was opened by Baugh, and the deceased made an assault on Baugh with a knife and cut and wounded him, and then and there Baugh attempted to defend himself with a pistol, but failed in his defence and was obliged to retreat or fly from deceased, and ran from the door of the cabin, and immediately or within a very short time thereafter, the deceased rushed again towards the door and assaulted Anderson with a knife and a pistol, or either of them—then Anderson had the right to defend himself the same as if he were in his own house, and if, in repelling said assault, Anderson, in the necessary defence of his person, with a shot-gun, shot at and killed the deceased, then Anderson was justifiable in his act of shooting, and neither of defendants is guilty, and the jury must so find in their verdict.”

The first was properly refused, because the jury had been sufficiently instructed with respect to a reasonable doubt. The second might properly have been refused, because too vague and indefinite. It does not follow from the fact that one brings on a difficulty, and follows it up, that the other may kill him. He may bring on the difficulty and follow it up in a manner that will not justify the other in killing him.

The court erred in refusing to give the third instruction. There was ample evidence upon which to base it, and it makes no difference that the only evidence tending to prove that Anderson and Baugh acted in self-defence was the testimony of themselves. However the jury may treat the testimony of one on trial for a crime, the court, in its instructions, must treat it precisely as if it was the testimony of a disinterested person. The original transcript in this cause contains instructions given for defendants on the theory of self-defence, as favorable to defendants as they had a right to ask, but the transcript filed here, as a return to a writ of *certiorari*, does not show that any instructions were given for

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defendants, and in their application for a *certiorari*, counsel for appellants state, and verify it by oath, that "the original transcript purports to set out certain instructions as having been given by the court in behalf of defendants, whereas, in truth and in fact, the bill of exceptions calls for no such instructions, and does not pretend, or state, that any instructions were given on behalf of defendants." What is done in the progress of a trial can only be known and preserved by a bill of exceptions. If the bill of exceptions neither stated that there were, nor called for, instructions given for defendants, the clerk had no authority to incorporate any as given for defendants. We may surmise that the circuit judge overlooked this defect in the bill of exceptions, and that the instructions for the defendants copied were actually given, and this would account for the refusal of the third of the above instructions; but the original transcript has been superseded by the one returned with the writ of *certiorari*, and we cannot look to it in the determination of this cause. Neither can we presume, as contended by counsel for the state, that the court gave all proper instructions. The transcript shows that, at the close of the evidence, the court gave instructions for the state, which are copied in full. That, thereupon, defendants asked the three hereinbefore noticed, which were refused, and, thereupon, the jury retired to consider of their verdict, etc. Those asked by defendants are marked in the transcript as A, B, C, D. There is nothing in this transcript which allows a presumption that any instructions asked by defendants were given.

There was no error in not giving to the jury an instruction in relation to manslaughter. There was no evidence upon which such an instruction could be based. If the testimony of the accused is true, they acted in self-defence, and should have been acquitted. It was a case of self-defence, or murder in one or the other degrees; but, for the errors above indicated, the judg-

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ment is reversed and the cause remanded. All concur, except Norton and Ray, JJ., who dissent.

NORTON, J.—I do not concur in reversing the judgment in this case for the following reasons: The original record before this court contained instructions given by the circuit court on behalf of the defendants, placing the law of self-defence before the jury in as strong, if not a stronger light, than those copied in the opinion of the court as refused. A motion, accompanied by affidavit, was made, suggesting a diminution of this record, in which it is stated "that the bill of exceptions, as signed by the judge of the circuit court, calls for the instructions given on behalf of the state, and those asked by defendants and refused by the court, marked A, B, C, D, and none others; that the transcript filed herein contains quite a number of instructions which purport to have been given on behalf of defendants, but which said last named instructions affiant states are not called for in said bill of exceptions, and were copied by the clerk of said Carroll circuit court through the oversight of said clerk, or on his own motion." This motion was sustained and a *certiorari* awarded, in obedience to which the clerk of said court returned a transcript only containing the instructions given on behalf of the state, and those which were asked by the defendants and refused by the court. This transcript does not show that any instructions were given on behalf of the defendants, nor does it negative the fact that none such were given, nor is it anywhere affirmed in the transcript that the instructions copied were all the instructions given in the case.

While I concede that the transcript last returned supersedes the original transcript, still with the *fact* before me, which the motion made for a *certiorari* virtually admits, that instructions were given on behalf of the defendants, I have a right to look at this fact and

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indulge the presumption that the instructions which were given on defendants' behalf contained a correct exposition of the law, and that because it had been thus correctly expounded the instructions asked for and refused were, for that reason, properly refused. It will be observed that the motion for *certiorari* does not give, as a reason for asking it, that the instructions given on behalf of defendants, as copied in the original transcript, were not, in fact, given, but the reason given is that the original bill only called for the instructions which were asked for by defendants and refused, and did not ask for those which were copied by the clerk, and given on the behalf of defendants. I take this to be as solemn an admission, that instructions were given for the defendants, as if counsel, in the course of the argument before this court, had admitted that, although the bill of exceptions did not show that instructions were given for defendants; that in truth and in fact, such instructions were given, and that defendants had the full benefit of them on the trial. It is creditable to the conscience of the gentleman who made the affidavit accompanying the motion, that he did not deny the fact that the instructions copied in the original transcript were given.

RAY, J.—I dissent from the opinion of the court in this case for the following reasons: As I understand the opinion, the reversal of the judgment of the circuit court is placed upon the ground of the refusal of the court to give what the opinion designates as the third instruction asked by the defendants, upon the doctrine of self-defence. If the record now before us shows, as I think it does, that other instructions were given by the court substantially embracing the theory of self-defence, and the facts upon which it is based, which fairly sub-

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mitted that question to the jury, then I think it is error to reverse for that reason.

The seventh instruction given for the state, and found in this record, under numerous decisions of this court, practically presents that question, and is as follows:

“The jury are instructed that the right of self-defence does not imply the right of attack; a party who seeks or brings on a difficulty, or who voluntarily, of his own free will and inclination, enters into a difficulty, cannot avail himself of the right of self-defence, however imminent the danger, or great the peril in which he may find himself in the progress of the difficulty, and if the jury believe from the evidence, beyond a reasonable doubt, that the defendants, or either of them, provoked, sought, or brought on, or voluntarily and of their own free will entered into a difficulty which terminated in the death of John Rea, then you cannot acquit said defendant or defendants upon the ground of self-defence.”

Instructions substantially like this have repeatedly been approved by this court, and held to “give the accused the full benefit of all he could claim in regard to the rights of self-defence.” *State v. Underwood*, 57 Mo. 50. To the same effect, also, are the following cases: *State v. Starr*, 38 Mo. 270; *State v. Linney*, 52 Mo. 40; *State v. Shoultz*, 25 Mo. 153; *State v. Christian et al.*, 66 Mo. 138, 145; *State v. Brown*, 63 Mo. 443; *State v. Hudson*, 59 Mo. 135, 138; *State v. Vansant*, 80 Mo. 69, 79.

The only real difference between the seventh instruction given for the state and what is here called the third instruction, asked and refused for the defendants, is that the latter submits the doctrine of self-defence, and the facts upon which it rests, in an affirmative form, while the former practically and substantially submits the same doctrine and facts in a negative form. Otherwise, there

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seems to be but little, if any, real difference between them. But concede that the affirmative form is the usual and better way in which to present this question, still, the practice of presenting the question in the negative form has met with frequent approvals of this court, and, if these rulings are to be adhered to, this case should be affirmed. But we may waive this question, and still, I think, there is enough in this record to require an affirmation of this judgment.

The opinion at one point says that "the transcript filed here, as return to a writ of *certiorari*, does not show that any instructions were given for the defendants;" and, at another point, it says that "there is nothing in this transcript which allows a presumption that any instructions asked by defendants were given." This, I respectfully suggest, is hardly an accurate statement of what, upon a careful examination, appears upon the amended transcript itself, now before us. I fully concur in the statement made in the opinion of the court, to the effect that, "what is done in the progress of a trial can only be known and preserved by a bill of exceptions," and giving full effect to that doctrine, it shows, in my opinion, that this judgment ought not to be reversed. The motion for a new trial, made by the defendants and copied in the amended as well as the original transcript, and which is conceded to be as much a part of the bill of exceptions and record in this case as any other portion thereof, shows clearly, I think, that at least one instruction, if not more, was given for the defendants, and under repeated rulings of this court, it has been held that if the party fails to preserve the same in the bill of exceptions, the court, in its absence, will presume that it correctly stated the law, and in such cases the court will not reverse the judgment.

The sixth cause assigned in defendants' motion for a new trial is as follows: "The court erred in refusing defendants' eleventh, twelfth, thirteenth, fourteenth and

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fifteenth instructions, and in modifying defendants' seventh instruction, by erasing the words 'if Anderson was in the cabin occupied by defendant Baugh, as his guest, and while there,' and the words 'came to the cabin.' " From this a fair and just inference might, I think, be drawn that instructions prior in number to said number eleven, and from one to ten inclusive, were given on defendants' behalf, and, at all events, it is clearly manifest, I think, that defendants' seventh instruction, modified by the court, was, in fact, given. It makes no difference that defendants' seventh instruction, when thus modified, thereby became and thereafter is to be treated as given by the court, on its own motion, still, it is, nevertheless, an instruction duly given in the cause, and is not preserved in the bill. What that seventh instruction, so modified, was, this bill of exceptions, as I understand it, fails to show. It is only identified by the number, "seventh," and is not otherwise set out or preserved by the bill of exceptions, and, in its absence, this court will presume that it stated the law correctly, and from aught that appears to the contrary, that may have been the reason why defendants' instruction "called for in the bill of exceptions" and identified as letter "D," was refused. 77 Mo. 474; 78 Mo. 73; 76 Mo. 18.

The defendants' motion in arrest, also copied in this record, at least, impliedly shows that instructions were given for defendants. The fifth subdivision of that motion is as follows: "(5) Because the verdict is, and the sentence and judgment on defendants would be against the law." The instructions for the state, manifestly, I think, are not the instructions here alluded to. It is probable, if not certain, that allusion is here made to instructions for defendant, which seem to be absent from this bill of exceptions.

In addition to all that, this bill of exceptions, in the amended record, which alone, it is conceded, must show what was done at the trial of this cause, fails to show

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that the defendants, in their motion for a new trial, called the attention of the trial court to the alleged error in refusing defendants' said instructions, "called for in the bill as lettered A, B, C, and D." No instructions, thus lettered and identified, appear in the motion for new trial. The only instructions then complained of as refused, as shown by the record, are marked as numbers eleven, twelve, thirteen, fourteen, and fifteen, and are not set out at length, so as to be thus identified. There is nothing in the present bill of exceptions sent up by *certiorari*, on defendants' motion, by which instruction lettered "D," called for in said bill of exceptions, and herein complained of for the first time, can be identified as any one of these in the motion for a new trial and there described as eleven, twelve, thirteen, fourteen, and fifteen, and, under the rule above stated in the opinion, this can only be done by the bill itself, since what is done at the trial can only thus be known and preserved. *Matlock v. Williams*, 59 Mo. 105; *Campbell v. Allen*, 61 Mo. 582.

It may be conceded that the bill of exceptions, in the transcript now before us, sufficiently identifies the instructions lettered as A, B, C, and D, as those called for in the bill, and it may also be conceded that the defendants, at the time of their refusal by the court, duly excepted to its action in so doing, and it may further be conceded that the defendants filed their motion for a new trial as set out in this bill of exceptions, and duly excepted to the action of the court in overruling the same; but still, it is insisted that the bill of exceptions fails to show that said instructions, so lettered, or either of them, was embraced in said motion for a new trial, or is the same as either of them. This the bill of exceptions alone must show, and this it fails to do. *Matlock v. Williams*, 59 Mo. 105; *Campbell v. Allen*, 61 Mo. 582. It may be, as has been held by this court, that in criminal cases it is the duty of the trial court to give all

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proper instructions, whether asked for or not, and that a failure to do so will warrant a reversal. 65 Mo. 155; 61 Mo. 233; 62 Mo. 596; 20 Mo. 55; 66 Mo. 149. But it has never been expressly held, so far as I am advised, nor does it necessarily follow from the above cases, that where instructions, in point of fact, are given or refused, that the accused need not except to the same, or again call the attention of the trial court thereto, by the usual motion for new trial, and again except to the action of the court in overruling the motion, if he wishes to avail himself of alleged errors therein in the appellate court. Indeed the rule, it seems to me, is otherwise, as appears by later adjudications of this court. In *The State v. McCray*, 74 Mo. 305, it is said, that "there is no motion for new trial incorporated in the bill of exceptions; consequently, what occurred at the trial, in the way of evidence adduced, or instructions given or refused, cannot be noticed by us. The rule, in this regard, is the same in criminal as in civil causes." To the same effect, also, are the following cases: *The State v. Dunn*, 73 Mo. 586; *The State v. Robinson*, 79 Mo. 66; *State v. Pints*, 64 Mo. 317; *Matlock v. Williams*, 59 Mo. 105.

The rule in this court, as repeatedly announced, is to the effect that a party will not be heard to complain of error in the giving or refusing of instructions, unless the attention of the trial court is called to the instruction in question in the motion for new trial, and this, the parties in this instance, as I understand the record, have failed to do. *State v. Emery*, 79 Mo. 461; *Birney v. Sharp*, 78 Mo. 73; *Anthony v. St. L., I. M. & S. Ry. Co.*, 76 Mo. 18; *Matlock v. Williams*, 59 Mo. 105; 61 Mo. 582. Indeed, the real question in the case at bar, as I understand the record, is not whether the trial court failed to give any instructions for the defendants, but whether, having given, in a modified form, defendants' seventh instruction, as the record clearly shows, it was not the duty of defendants to preserve that instruction

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in their bill of exceptions, and if they have failed so to do, ought not this court in its absence, under prior rulings, presume that it stated the law correctly, and in such case, the refusal of defendants' instruction, lettered "D," would afford no just cause for a reversal of this case.

THE STATE *ex rel.* BOYINGTON, *Appellant*, v. RANSON
et al.

Attachment: INTERPLEA: APPEAL: SUPERSEDEAS: EXECUTION,
WHEN OFFICER NOT LIABLE FOR FAILURE TO LEVY. The pendency of the appeal of an interpleader from the judgment of a justice of the peace in an action of attachment, where bond is given by the interpleader, operates as a *supersedeas* in the cause, and prevents the sale of the attached property pending such appeal, and an officer is not liable in such case for failure to levy an execution issued against the property interpleaded.

Appeal from Jackson Circuit Court.—HON. F. M.
BLACK, Judge.

AFFIRMED.

Bryant, Holmes & Waddill for appellant.

The defendant in the attachment suit having been personally served, the judgment and execution against him were general. 1 W. S. pp. 188, 189, secs. 36, 40. And by virtue of the provisions of 2 Wagner's Statutes, page 841, section five, that execution was a perfect and subsisting lien on the goods, which had been seized under the writ of attachment and which were then in the custody of defendant Ranson, as constable. "In all cases of seizure of personal property, under attachment, the officer is compelled to determine, at his peril,

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whether the property seized is that of the defendant in the writ." After the officer has so determined that the property is the defendant's, and has seized it under the attachment, the property instantly passes into the custody of the law by order of the court issuing the writ of attachment, and is from that time forth subject to the orders of that court; so that when the plaintiff's debt ripened into a judgment, it was the plain duty of the officer to have obeyed the mandate of the court contained in the execution, and have levied the same, a general execution under the circumstances of this case, where the defendant has been personally served, having precisely the same effect as a special execution. R. S. 1879, sec. 455; 69 Mo. 149. If the property of a third person is seized under a writ of attachment, he has, certainly while the attachment is pending (and most, if not all of them even afterward), several remedies open to him. He may interplead, maintain replevin, trespass, an action on the bond of the officer, or (under R. S. 1879, secs. 3023, 3025), demand the property, and if not delivered, sue upon the indemnifying bond. *State ex rel. v. Langdon*, 57 Mo. 353; *State ex rel. v. Fitzpatrick*, 64 Mo. 185. And if the claimant interplead, and his interplea be sustained, he may still maintain trespass against the officer (*Clark v. Brott*, 71 Mo. 473); or against the plaintiffs, if they defend the interplea. *Perrin v. Claflin*, 11 Mo. 13. This being the case the claimant could just as well maintain any one of the other remedies already mentioned, if applicable to the then condition of the property, and would afford him more adequate and complete redress. "The right to interplead is in the nature of an action of replevin, engrafted upon a suit by attachment." *Burgert v. Borchert*, 59 Mo. 85. It is tantamount to an action of replevin without bond and will not absolve an officer from his duty to levy an execution.

C. O. Tichenor for respondent.

(1) Without the statute, parties could not come into

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court as interpleaders. *Gordon v. McCurdy*, 26 Mo. 305; *Risher v. Gilpin*, 29 Ind. 53. (2) The issues upon the interplea shall be tried without unnecessary delay. R. S., sec. 449; *Keiser's Adm'r v. Moore*, 16 Mo. 180; *Ladd v. Cousins*, 35 Mo. 516. (3) The writ of attachment is to hold the property seized to satisfy a judgment to be obtained, subject to the result of a plea in abatement or an interpleader, in case such should be filed. The property is in the custody of the court. *State to use, etc., v. Langdon*, 57 Mo. 355; *Metzler v. Graham*, 66 Mo. 660; s. c., 57 Mo. 410; *Weisnecker v. Kepler*, 7 Mo. 54; *O'Brien v. Norris*, 16 Md. 129; *Hall v. Richardson*, *Ib.* 410; *Heinman v. King*, 8 B. Mon. 565; *Hershey v. The Institute*, 15 Ark. 130. It is because of this that state and United States courts refuse to interfere with property, seized by the writs of the other. See cases cited in *Metzler v. Graham*, 57 Mo. 410. (4) The interplea concerns the property. It is the road by which the claimant pursues it; a money judgment cannot be rendered. *Hewson v. Tootle*, 72 Mo. 632. If plaintiff's position is correct, an interplea will always be in vain—will be a pursuit after a thing which has effectually escaped. (5) Levy means actual seizure of the personal property; as there had been such seizure by the attachment, no levy was necessary under the execution. *State to use, etc., v. Doan*, 39 Mo. 49. Under these circumstances the officer could not be sued for failure to levy. Whether it was a proper case for an officer to sell should have been tested by an application to the circuit court for an order to sell.

SHERWOOD, J.—Action on the bond of Ranson, as constable, for failure to execute and levy a certain execution in favor of relator and against Joseph Cochran. The facts in the case appear in the following agreed statement of facts:

"1. That on August 21, 1875, the relator commenced a suit, by attachment, against one Joseph

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Cochran before Langston Bacon, a justice of the peace in and for Kaw township, Jackson county, Mo., in which suit a writ of attachment was duly issued and directed and delivered to Thomas Fitzpatrick, the then constable of Kaw township, and which said writ of attachment was duly served personally on said Joseph Cochran, and by attaching the following goods and chattels as the property of said Cochran, to-wit: One walnut bedstead, one walnut bureau (marble top), one marble top washstand, one oak bedstead, one oak marble top bureau, and one oak washstand.

"2. That on September 21, 1875, the said attachment writ having been duly transferred by change of venue from said Langston Bacon to W. H. Sutton, a justice of the peace in and for said Kaw township, one S. A. Cochran interpleaded for the goods attached, and on September 21, 1875, judgment was duly rendered thereon against said interpleader and in favor of said relator, from which said judgment by said Sutton, justice, the said interpleader on September 24, 1875, duly appealed to the Jackson county special law and equity court, where the judgment of said justice on said interplea was duly affirmed on May 23, 1877.

"3. On October 5, 1875, the defendant Ranson, having been duly appointed constable of said Kaw township to succeed said Thomas Fitzpatrick, together with defendants, Lucius Cary and Aimie Guinotte and Bernard Donnelly, as his sureties, duly executed and delivered his official bond, a true copy of which bond, and of the approval of the county court endorsed thereon, duly certified by Wm. Z. Hickman, county clerk, is attached to the petition in this cause; and the said goods so attached, as aforesaid, duly passed into the possession of said Ranson as the successor of said Fitzpatrick.

"4. The relator's attachment against said Joseph Cochran was duly sustained, and on November 15, 1875, judgment was duly rendered by said Sutton, justice, in

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said attachment suit, in favor of relator and against said Joseph Cochran for \$127.15 and costs, taxed by said justice as follows: Justice's costs (Sutton), \$8.75; constable's costs, \$6.50; justice's costs (Bacon), \$4.50; A. W. Moise (two days as witness), \$1.00.

"5. On said November 15, 1875, execution was duly issued by said Sutton, justice, upon said last mentioned judgment, and directed and delivered to defendant Ranson, as such constable of Kaw township, whereby the said Ranson was directed and commanded to levy the said debt, interest and costs recovered by the relator as aforesaid, of the goods and chattels of said Joseph Cochran; and the relator on said November 15, 1875, then and there directed and commanded said Ranson to levy said execution on the goods and chattels so attached, as the property of said Joseph Cochran, and then in the possession of said Ranson as aforesaid; but said Ranson did not execute and levy said execution on said goods as commanded, but wholly neglected and refused so to do, and on February 14, 1876, returned said execution wholly unsatisfied; nor did the said Ranson, on the return of said writ, or at the time the same ought to be returned, have the money in said writ specified or thereon endorsed, and directed to be levied, or any part thereof, before the court, or pay the same according to the exigency of said writ.

"6. On December 11, 1875, the said Joseph Cochran filed his voluntary petition in bankruptcy, in the United States district court for the western district of Missouri, and he was, by said court, on December 13, 1875, duly adjudged a bankrupt. Afterwards, in November, 1876, said Ranson, holding said property, went out of office, and one Samuel Howard, to whom said Ranson then delivered said property, was his successor in office. And afterwards (after May 27, 1877, the date of the affirmance of the judgment on said interplea), on the demand of the assignee in bankruptcy of said Joseph Cochran, said

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property was by said Howard delivered to said assignee in bankruptcy."

The trial court, upon the facts thus agreed, refused a declaration of law "that on the pleadings and agreed statement of facts, the finding and judgment must be for plaintiff," and thereupon gave judgment for the defendants. This ruling we regard as correct. The pendency of the appeal of the interpleader, he having given bond, as he must have done, in order to take an appeal from the judgment of the justice, operated as a *supersedeas* in the cause and prevented any sale of the attached property pending such appeal. This must be true, or else such an appeal fails of its customary effect, and is shorn of its ordinary powers. We see nothing in the statute warranting any view contrary to the one now expressed. It is true section 449, Revised Statutes, provides that when an interplea is made for attached property, that the issues made by the interplea "shall be tried without any unnecessary delay;" but this mandate of the statute is not to be permitted to thwart and override other statutory provisions, relating to appeals when accompanied by bonds. In the case of *The State ex rel. v. Lewis*, 76 Mo. 370, the same position was taken in regard to a writ of mandamus, and it was urged that as, under the provisions of the statute, section 3260, the peremptory writ was to be granted "without delay," that these provisions prevented an appeal taken in the cause, bond being also given, from operating as a *supersedeas*. But this court ruled this position was not law, though in the case of *School District No. 11 v. Lauderbaugh*, 80 Mo. 190, in which I dissented, it had taken the previously taken, the now repudiated view.

No sound distinction, in my opinion, can be taken between the effect of the statute relating to interpleas and of that relating to peremptory writs of mandamus. In the former case, as well as in the latter, an appeal with bond operates as a *supersedeas*, and while the law,

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in a case like the present, ties the hands of the officer and prevents him from doing aught under an execution issued against the property interpleaded for, it is neither so inconsistent, unreasonable nor unjust, as to hold such officer liable for non-performance of something out of his power.

We affirm the judgment. All concur.

MURPHY V. SMITH, *Appellant*.*

1. **Equity: FRAUD IN OBTAINING JUDGMENT.** Where a judgment is fraudulently obtained against one, in violation of a compromise agreement, any title acquired thereunder by the plaintiff in the suit or by any one having notice of the injustice practised in obtaining the judgment, is voidable in equity as against the defendant in such suit or those claiming under him.
2. **Compromise of Suit: JUDGMENT FOR COSTS.** A court is not authorized to render a judgment for costs in carrying out a compromise of the parties to the suit, except in pursuance of a stipulation to that effect entered of record, or the consent of parties given in open court.
3. **Fraudulent Judgment, Sale Under: REMOVAL OF CLOUD ON TITLE.** The evidence in this case reviewed and held, reversing the finding of the trial court, that a purchaser at a sheriff's sale and his vendee bought with notice of the fraud practiced in obtaining the judgment and the title asserted thereunder removed as a cloud on defendant's title by divesting it out of plaintiff and vesting it in defendant.
4. ——— : ——— : **WHEN PURCHASE MONEY NOT RESTORED.** Said relief granted in this case without requiring the defendant to restore the purchase money paid at the sale, for the reasons that it was not paid in discharge of any lawful lien upon the land and the defendant did not have the benefit of any part of it.

* The opinion in this case was rendered by Commissioner Martin at the October term, 1884, of the court and a motion for re-hearing was filed which was not determined until the April term following.

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Appeal from Maries Circuit Court.—HON. A. J. SEAY,
Judge.

REVERSED.

Edwin Silver for appellant.

(1) The facts set up in defendant's answer are supported by the evidence and entitle him to equitable relief. *Bresnehan v. Price*, 57 Mo. 424; *Eck v. Hatcher*, 58 Mo. 235; *Hopkins v. Williams*, 58 Mo. 201; *Major v. Buckley*, 51 Mo. 227; *Massey v. Young*, 73 Mo. 260. (2) The answer distinctly charges knowledge of the fraud in procuring the judgment against William Ammerman on plaintiff, but he failed to appear and testify to his own innocence, which must be taken as a strong circumstance against him. *Mayberry v. McClurg*, 74 Mo. 575. (3) The gross inadequacy of the price for which the land was sold at the sheriff's sale warrants equitable interference. *Durfee v. Moran*, 57 Mo. 379; *H. & St. Jo. Ry. v. Brown*, 43 Mo. 294; *Parker v. Railroad*, 44 Mo. 415. (4) The circumstances of this case show an equitable satisfaction of the judgment under which the land was sold before such sale. Where a judgment is satisfied a sale under it will convey no title, not even to a purchaser without notice. *Reed v. Austin*, 59 Mo. 234; *Durette v. Briggs*, 47 Mo. 356. (5) Nor was the judgment and sale good because Ammerman had failed to pay the costs. The proper way to collect merely the costs in a cause is by fee bill under Revised Statutes, section 5595. (6) Defendant was in possession of the premises in controversy under a deed of record when A. M. Murphy purchased and also when plaintiff bought from the latter. These facts were sufficient to put A. M. Murphy, plaintiff, upon inquiry as to any facts affecting their title. *Sergeant v. Ingersoll*, 7 Pa. St. 340.

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Smith & Krauthoff and *L. F. Parker* for respondent.

(1) The evidence does not present a case which entitles the defendant to relief upon equitable grounds. The judgment, execution and sheriff's deed under which the plaintiff claims are regular upon their face. There is no positive evidence that A. M. Murphy had any reason to suspect that the judgment and sale were not what they appeared to be. On the contrary, he positively denies any knowledge and his statements are supported by those of disinterested parties who were present at the sale. This is not a case of a sale under a judgment that has been satisfied. (2) The defendant has been guilty of such inexcusable laches as to debar him of whatever right to equitable relief he once possessed. *Quinlan v. Keiser*, 66 Mo. 604; *Bliss v. Prichard*, 67 Mo. 181; *Kelly v. Hurt*, 74 Mo. 561. (3) The defendant does not offer to do equity by restoring the purchase money paid at sheriff's sale; he cannot, therefore, claim equity. 1 Story's Eq. (12 Ed.) sec. 642; *Whelan v. Reilly*, 61 Mo. 565. (4) Plaintiff having purchased from a purchaser without notice, takes the latter's title just as he had it. *Halsa v. Halsa*, 8 Mo. 303; *Lemay v. Ponperez*, 35 Mo. 71-76; 1 Story Eq. Jur. (12 Ed.) secs. 409, 410; 3 Wash. Real Prop. (4 Ed.) 339; 1 Dan. Neg. Inst. (3 Ed.) sec. 803.

MARTIN, C.—The plaintiff sued in ejectment, and the defendant in his answer pleaded facts constituting an equitable defence, and prayed for affirmative relief against the title asserted against him.

It appears from the evidence, in which there is no conflict, that one R. E. Hutchison, as executor of Daniel Bailey, held a note against William Ammerman and Joseph Ammerman, dated September 25, 1872, payable in the sum of \$196.69, one day after date, which note

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had been executed and delivered to said Hutchison for a debt due the estate of said Bailey by William Ammerman, one of the makers. On the twenty-third of September, 1874, Hutchison, in his individual capacity, brought suit on said note against the makers thereof. Due service was obtained on both defendants. Before judgment on the note by default or otherwise, Hutchison and Ammerman entered into an agreement for a settlement of the debt and dismissal of the suit. At the time of this agreement, one G. W. Shinkle, as curator of Bailey's minor children, held a note against Hutchison, the executor of the estate. A statement of the amount of the note in suit, with interest, was handed to Wm. Ammerman, along with the amount of costs, not exceeding six or seven dollars. It was agreed that Ammerman should pay the amount of the note in suit with interest to G. W. Shinkle, who should credit the amount so paid on the note he held against Hutchison, and that the suit should be dismissed at Ammerman's costs. As Ammerman did not have the money on hand at the time of the settlement, it was agreed that he should execute a new note for Shinkle representing the amount of the note and interest in suit, and should secure it with a deed of trust to Shinkle on the land in controversy, which belonged to said Ammerman.

Accordingly, on the seventeenth of October, 1874, Wm. Ammerman executed his note in the sum of \$241.55, secured by deed of trust which was, by Hutchison, passed over to Shinkle, who accepted it and gave credit therefor on the note he held against Hutchison. Notwithstanding this settlement of the note in suit, Hutchison, without the knowledge of Wm. Ammerman, or his co-defendant, obtained a judgment by default against them on the thirteenth of October, 1875, which on the same day was made final in the full sum of the debt and for costs. This judgment on the margin thereof is certified as having been assigned by Hutchison to one A. Corse on the tenth of

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April, 1877. No execution was issued on the judgment at this time. On the eleventh of July, 1876, William Ammerman sold the land to the defendant, and with the purchase money paid off the note and mortgage he had given to Shinkle, and it is marked paid as of November 9, 1876. Long afterwards, on the thirteenth of March, 1878, execution was issued on the judgment of October 13, 1875, under which the land in controversy was levied upon and advertised for sale April 9, 1878. Ammerman did not know there was a judgment until he saw the land advertised for sale. On the day of sale and prior thereto Wm. Ammerman appeared in court and filed a motion to quash the execution and stay all proceedings under it, on the ground that the debt and judgment had been satisfied. This motion was supported by an affidavit setting out the satisfaction and payment of the note, as hereinbefore stated. It was resisted by Mr. Parker, attorney of the present plaintiff, and by Mr. Corse, apparent assignee of the judgment. During the pendency of this motion the sale took place and one A. M. Murphy became purchaser of the land at the price and sum of seventy-three dollars. On the nineteenth of April, 1878, he made conveyance of it to W. H. Murphy, the present plaintiff, alleging as a reason that he had been told that he had bought a law suit, and he did not feel able to defend it. The land was worth seven or eight hundred dollars. The defendant was in possession of it by virtue of his purchase from Wm. Ammerman. The court rendered judgment in favor of plaintiff, from which the defendant has appealed.

Unquestionably the judgment, by virtue of which the land was seized and sold, was procured by Mr. Hutchison against equity and good conscience. The note upon which default and judgment in the full amount was entered had been compromised by accep-

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tance of the other note of Ammerman secured by deed of trust. Hutchison had accepted and turned over said note and deed of trust to his creditor, Shinkle, and had received credit on his own obligation to the full amount of the paper so received and turned over. It was an act of extreme injustice in him to insist on an enforcement of the note after it had thus been settled and paid by the defendant. And the defendant had no reason to expect such a movement. *Bresnehan v. Price*, 57 Mo. 422. It is urged by the learned counsel for plaintiff that although Hutchison had no right to a judgment on the note, he was entitled to a judgment for costs, and that as the judgment for costs was right, the sale under it could not be affected by the fraud which impeaches the judgment on the debt. It is true that Ammerman agreed orally to pay the costs, but he made no agreement or stipulation authorizing a judgment for costs. If the plaintiff had gone on with his suit he could not upon the true state of facts have obtained a judgment for the debt. On proof that the debt had been paid since suit, the judgment would have been for defendant, and that would have carried costs against the plaintiff as incident to it. Our statute provides that "in all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law." R. S., 1879, sec. 990. No other provision by law is applicable to the case at bar. If a party in his compromise agreement stipulates for an adjudication of costs, in such a manner that a court would feel justified in enforcing it, irrespective of any judgment on the cause of action, such stipulation might afford special authority to the court to render judgment in accordance with its requirements. *Thompson v. Union Elevator Company*, 77 Mo. 520. But there was no stipulation in this case authorizing the court to enter judgment for costs except as incident to a judgment on the merits.

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When a court assumes to carry out a compromise requiring a special judgment for costs it should be in pursuance of a stipulation to that effect filed of record, or should be with the consent of the parties in open court. I do not think the court could have rendered the judgment for costs contended for, under the circumstances of this case, without the written or oral consent of the defendants. Having no right to the judgment for either debt or costs in the suit, any title acquired by the plaintiff in the suit on the note, or by any one having notice of the injustice practiced by him would be voidable as against the defendants or parties holding title from them.

The only question about which there can be any controversy is whether A. M. Murphy had actual or constructive notice of the injustice by which the judgment was procured. On this issue I think the court erred in finding for the plaintiff, who is the assignee of A. M. Murphy. It may be remarked that A. M. Murphy purchased under a judgment which was being attacked for fraud on the day of his purchase; that this contest came off in the court room just before the sale upon papers of record in the case; that the parties interested in the judgment as of record took open and public action after voluntary appearance by them; that he admits that he saw Mr. Parker, the attorney who resisted the motion; that he met Parker several times in the forenoon before the sale took place; that he may have been in the court room, but did not hear the arguments on the motion. I think it very improbable that he failed to hear anything of the facts tending to impeach the judgment. Indeed, he does not in his evidence deny a knowledge of the proceeding itself, although he negatives hearing about the motion. Mr. Ammerman, on being recalled, testified that he informed Mr. Murphy before the sale was over that he was buying a law suit. Corse, Parker and Murphy were all bidding

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at the sale. The fact that land worth seven or eight hundred dollars was going at seventy-three dollars ought to have raised the suspicions of the purchaser. This fact in its nature would tend to indicate an infirmity of the title offered. At the time of the sale the land was in possession of the defendant claiming it by deed of record. Mr. Murphy, the purchaser, admits that he had seen the land before the sale. Under all these circumstances pointing to the defective judgment it is rather extraordinary that Mr. Murphy should have made no inquiry from any one, prosecuted no search or investigation of the suit and proceedings under which he was about to purchase, but was content at receiving all this information immediately after the sale and before he got home.

The plaintiff, W. H. Murphy, is in no better condition than A. M. Murphy, the purchaser at execution sale. It is evident that he understood that he was assuming a law suit when he purchased. The sale to him was with that view, and he does not come forward to contradict it. He has the title acquired by A. M. Murphy and nothing more.

The defendant in his answer prays that the proceedings in the suit on the note be annulled; that the sheriff's sale and deed thereunder as well as the deed to plaintiff be set aside and held for naught, and for such other and further relief as in equity and good conscience he may be entitled to. It would not be in accordance with the approved practice prevailing in equity courts to vacate or annul the proceedings of record in the action on the note, or to set aside the sheriff's sale or the deeds made in pursuance thereof, in this case, for the reason that no parties to the suit on the note or to the sheriff's sale or deed are before this court. Neither, on the other hand, is the plaintiff entitled to the return of the seventy-three dollars paid at the sheriff's sale upon any equity existing in his favor, or in favor of his

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grantor, for the reason that it was not paid towards the discharge of any lawful lien upon the land, nor has defendant had the benefit of any part of it.

Proceeding to administer under the general prayer of relief the equity to which the defendant is entitled as against the plaintiff, under the facts of the case, I have only to say that so far as he is concerned, the title which he has acquired and asserted in his action of ejectment is fraudulent as against the defendant and constitutes a cloud and an embarrassment upon the true title to the land which is vested in the defendant. Accordingly, the judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment for defendant, to the effect that the plaintiff have nothing by his action, and that the title asserted by him in pursuance of the sheriff's deed and subsequent conveyance to him be divested from him and vested in the defendant; and that the defendant recover his costs and have execution therefor. All concur.

KIRKPATRICK *et al.*, v. THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILROAD COMPANY, *Appellant*.

1. **Practice : PARTIES : CONSIGNEE, RIGHT OF ACTION OF : RAILROAD : DAMAGES.** The consignees of a car load of wheat screenings, shipped over a company's railroad, but which was destroyed before reaching its destination, may maintain an action against the railroad company for the recovery of damages for such destruction.
2. — : — : — : —. Where the consignee of goods shipped upon a railroad pays the draft drawn on him by the shipper and receives the bill of lading to which the draft is attached, and subsequently purchases the goods from the owner, he thereby becomes the real party in interest under the code. R. S., sec. 3462.

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And it makes no difference that the goods were destroyed before the absolute sale, as the property of the owner in them still continued and was the subject of transfer, and the transferee could maintain action for damages for their destruction on the ground of such transfer.

Appeal from Jackson Circuit Court.—HON. T. A. GILL,
Judge.

AFFIRMED.

Plaintiffs were merchants residing and doing business in Kansas City. H. B. Slaughter, a grain dealer, residing and doing business there, contracted for two car loads of wheat screenings with H. C. Goodell, of Winthrop (or East Atchison), Mo. On the twenty-fifth of March, Slaughter went to Winthrop, examined the car load of screenings in controversy, accepted it, took a sample of it, and instructed Mr. Goodell to bill the car to plaintiffs at Kansas City, and draw on them for the price, attaching draft to bill of lading, as he might not be at home when it arrived there, and he had arranged with plaintiffs to take care of the draft if he was away from town, which Goodell accordingly did. Plaintiffs paid the draft, amounting to \$215.05, on presentation, and charged the amount to Slaughter on their books. On the twenty-ninth of March the screenings were totally destroyed by the wrecking of the car while in course of transportation over the defendant's line, at a point about four miles below Winthrop.

Some time between two and three weeks after the twenty-fifth day of March, plaintiffs purchased the screenings of Slaughter, by the sample he had, for eighty-five cents a bushel, and it was agreed between them that sixty pounds should be considered a bushel; that Slaughter should deliver the screenings to the State Line Elevator, at Kansas City, the screenings to be there weighed and paid for by the elevator weights. Having

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learned that the screenings were destroyed, the plaintiffs and Slaughter, on the third day of May, agreed to adjust the matter between them on the basis of Goodell's Atchison weights, which was accordingly done, and the price of the screenings at eighty-five cents per bushel, Atchison weights, was credited to Slaughter on plaintiffs' books. Plaintiffs demanded of defendant the value of the screenings at eighty-five cents a bushel, which being refused, they instituted this action in the Jackson circuit court.

On behalf of the plaintiffs, the court, at their request, gave to the jury the following instructions :

"1. If the jury believe from the evidence that the defendant did receive from H. C. Goodell the grain described in the petition, the property of H. B. Slaughter, and did execute the contract read in evidence, the defendant thereby agreed to safely convey and deliver said goods to Kirkpatrick & Christopher, at Kansas City, Missouri, and if the jury further believe from the evidence that said Slaughter afterwards sold and transferred said grain and said contract to plaintiffs, and that defendant failed to deliver said goods to said Kirkpatrick & Christopher, at Kansas City, Missouri, that they must find for the plaintiffs."

"2. If the jury find for the plaintiffs, they are instructed that the measure of damages to be allowed the plaintiffs is the value of the grain at Kansas City, at the time the grain should have arrived, with interest at six per cent. from said time, after deducting freight and other expenses of transportation."

The court, on its own motion, instructed the jury as follows :

"That, in order to constitute a valid sale and delivery of the screenings by Slaughter to plaintiffs, Slaughter must have done everything which, by the terms of the bargain, was incumbent on him to do; he

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must have intended to part with his possession of the screenings, and must have actually parted with the possession thereof, and the plaintiffs must have received said screenings with the intention and for the purpose of holding the same as owner. But the court instructs the jury that a delivery of the bill of lading read in evidence 'to' the plaintiffs, if, in fact, there was such a delivery, constitutes a sufficient delivery of the screenings to pass title thereto."

Strong & Mosman for appellant.

(1) Only "the person to whom the promise is made and with whom it is to be performed, is entitled to sue" on a special contract or undertaking for the carriage of merchandise. *Gardner v. Armstrong*, 31 Mo. 538; *Southern Express Co. v. Craft*, 49 Miss. 480; s. c., 19 Am. Rep. 4; *Finn v. Western Railroad*, 112 Mass. 524; sec. 499, Angell on Carriers. Section 3462, Revised Statutes, does not alter the common law rule. The party to whom the promise is made and with whom it is to be performed is the real party in interest. *Gardner Case, supra*; *Craft's Case, supra*; *Blanchard v. Page*, 8 Gray, 281; *Hale v. Mil. Dock*, 29 Wis. 498. It is not pretended here that there was ever any assignment of the contract for the shipment. In a suit for a violation of the contract, the question, under section 3462, is, who is the real party in interest in the contract itself. In such a case it is a matter of no consequence who owns the subject-matter in relation to which the contract is made. *Harvey v. Railroad Co.*, 74 Mo. 538. (2) Plaintiffs were not the real parties in interest in the contract, and the contract was not made for their benefit. The property in the goods did not vest in the consignee on delivery to the carrier, and he had no lien on or property in them before actual delivery to himself. *Bruce v. Andrews*, 36 Mo.

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593; *Sergeant v. Morris*, 3 B. & Ald. 277; *Stattenwerck v. Thatcher*, 115 Mass. 224. (3) The screenings were destroyed before the sale and the sale is void. Benj. on Sales, p. 94, sec. 76; *Hastie v. Courtier*, 9 Exch. 102; s. c., H. L. C. 673; *Barr v. Gibson*, 3 M. & W. 390; 1 Pars. on Cont. (5 Ed.) 567-8. This was a sale of goods "to arrive," and in order to make it valid they must arrive. 1 Parsons on Cont. (5 Ed.) 552, 554, 555, 567, 568. The sale did not comply with the statute of frauds, and was, therefore, void. 1 Pars. on Cont. 559. As the sale was by sample, until delivery and acceptance was shown, it was wholly executory, and the title to the property remained in Slaughter. *Prescott v. Locke*, 51 N. H. 94; Benj. on Sales, sec. 910, p. 790 (4 Am. Ed.); *Ober v. Carson*, 62 Mo. 209; *Swan v. Shepherd*, 1 Moody & R. 223; *Goodwyn v. Douglass*, 1 Cheves, 174. As by the terms of the sale the property was to be paid for at Kansas City elevator weights, such weighing was a condition precedent to the passage of the property in the screenings. Story on Sales, sec. 220 *b.* and *c.*; 1 Pars. on Cont. 527, note *f*; *Prescott v. Locke*, 51 N. H. 94; *Groff v. Belche*, 62 Mo. 400. For the foregoing reasons defendant's instruction in the nature of a demurrer should have been given; also, its first instruction, and plaintiff's first instruction should have been refused. Plaintiff's second instruction should have been refused.

Bryant & Holmes for respondents.

(1) Defendant's answer is simply a general denial, and the point that plaintiffs are not proper parties to maintain this action, not having been specially pleaded, has been waived. R. S., 1879, secs. 3515, 3519; Pomeroy's Rem. & Rem. Rights, sec. 711; *Jackson v. Whedon*, E. D. Smith, 141; *Savage v. Ins. Co.*, 4 Bosw. 1; *Russell v. Clapp*, 7 Barb. 482; *Seeley v. Engell*, 17 Barb.

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530; *Brett v. First Universalist Society*, 63 Barb. 610; *Raymond v. Pritchard*, 24 Ind. 318; *Garrison v. Clark*, 11 Ind. 369; *Swift v. Ellsworth*, 10 Ind. 205; *Lamson v. Falls*, 6 Ind. 309. (2) (a) That plaintiffs may maintain this action, because they are the consignees. 2 Rorer on Railroads, p. 1330, sec. 5; *Sawyer v. Joslin*, 20 Vt. 172, 181; *Webb v. Winter*, 1 Cal. 417; *Griffith v. Ingledew*, 6 S. & R. 429; *Southern Express Co. v. Caperton*, 44 Ala. 101; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Railroad Co. v. Nelson*, 1 Cold. 272. (b) That plaintiffs may maintain this action, because they are the real parties in interest. R. S., 1879, sec. 3462; Rorer on Railroads, p. 1332, sec. 5; *Southern Express Co. v. Caperton*, 44 Ala. 101; *Hooper v. Ry. Co.*, 27 Wis. 81; *Jones v. Sims*, 6 Porter, 138; *Barrett v. Rogers*, 7 Mass. 297. (3) (a) Plaintiffs were purchasers of the screenings, within the meaning of the law, from the time of the advancement and receipt of the bill of lading, the symbol of ownership. Rorer on Railroads, p. 1328, sec. 2; *Peters v. Elliott*, 78 Ill. 321; *Railroad v. Phillips*, 60 Ill. 190; *Gibson v. Stevens*, 8 How. (U. S.) 384; *Bank v. Dearborn*, 115 Mass. 219; *Holbrook v. Wight*, 24 Wend. 169. (b) Defendant was liable to either plaintiffs or Slaughter, and as Slaughter testified that plaintiffs bought the screenings of him, this would certainly be a satisfaction against Slaughter. *Goodwyn v. Douglass*, 1 Cheves (S. C.) 174. (c) As to the statute of frauds, the appellant, being a third party as to the contract between Slaughter and plaintiffs, cannot invoke the application of that statute for its own benefit. Browne on Frauds, sec. 135, and cases there cited. Furthermore, the benefit of that statute, to be availing, must always be pleaded. *Gist v. Eubank*, 29 Mo. 248; *Gardner v. Armstrong*, 31 Mo. 535; *Hoffman v. Ackley*, 34 Mo. 277; *Rabsuhl v. Lack*, 35 Mo. 316.

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SHERWOOD, J.—Action by plaintiffs, who were consignees of a car load of wheat screenings shipped on defendant's road, but destroyed before reaching the point of destination. The controlling question in this case is the right of plaintiffs to maintain this action. On this point we entertain no doubt. 2 Rorer on Railroads, 1330, sec. 5; *Ib.* 1332, sec. 5; 1328, sec. 2, and cases cited. Moreover, the plaintiffs paid the draft drawn on them and received the bill of lading to which the draft was attached, and subsequently purchased the wheat from the owner, Slaughter. 2 Rorer on Railroads, 1318, sec. 2. They thus became the real parties in interest, under the code. Section 3462. The fact that the screenings were destroyed prior to their absolute sale to plaintiffs does not affect the proper conclusion to be reached. The property of Slaughter in the screenings still continued and was the subject of transfer to plaintiffs, and they could maintain this action on the ground of the transfer, if upon no other.

The instructions given at the instance of plaintiffs, and of the court's own motion, placed the matter before the jury on the theory of the law as above announced, and discovering no substantial error in the record (R. S., secs. 3569, 3775), we affirm the judgment. All concur.

**MANN V. THE CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, *Appellant*.**

1. **Railroad : CROSSING OUT OF REPAIR.** Where a railroad owes no duty to one to keep a private crossing in repair, he cannot recover for an injury sustained by his wagon thereon caused by the crossing being out of repair.

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2. ——— : ——— : NOTICE. A railroad is not liable for an injury resulting from its crossing being out of repair, unless it had notice of such fact or the defect existed a sufficient length of time to justify the presumption of notice.

Appeal from Daviess Circuit Court.—HON. S. A. RICHARDSON, Judge.

REVERSED.

This was an action to recover damages for injuries sustained by plaintiff's wagon by reason of a collision with one of defendant's trains at a private crossing located on the land of another. It was averred in the petition that prior to the eighteenth day of September, 1877, the defendant "undertook and agreed to construct and maintain a crossing for the use of the public as a highway" at the point in question; that in constructing said crossing it became necessary to construct a small bridge to span a ditch which ran along the railroad; that at said point defendant constructed two gates in the fence, on each side of its right of way, "in order that travelers might pass through thereat;" that after said crossing and gates were constructed, the traveling public, being informed of the provisions made for the public travel through said gates and over said crossing, "began to pass through said gates and over said crossing and have ever since continued so to do, by the consent and invitation of the defendant;" that on the eighteenth day of September, 1877, plaintiff attempted to drive a loaded wagon across said bridge, when, "by reason of its insufficient and rotten condition, negligently constructed and maintained by defendant," it gave way and let his wagon into the ditch, whereby it became fastened upon the crossing, and that while it was so fastened, one of defendant's trains negligently and carelessly ran against and destroyed said wagon.

Among other things, the defendant answered, that

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"the plaintiff had no right to drive his said team over said crossing; that, at the time and place mentioned, plaintiff, without leave or authority, was attempting to drive his horses with said wagon across the right of way and track of this defendant, and that said horses were then and there so carelessly, negligently and improperly managed by plaintiff, that the accident and damage to plaintiff, if any, was caused solely by such careless, negligent and improper management and driving of said horses, and not by the fault or neglect of defendant."

On the trial the plaintiff introduced evidence tending to show that the bridge was defective, and that he "knew its condition before the accident;" that his son attempted to drive across the bridge with a load of wood, and that while doing so the horses shied, causing one of the wheels of the wagon to run too near the east end of the bridge, when the bridge broke at that end and let the wheel down.

After making an unsuccessful effort to get the wagon off the railroad track the driver attempted to signal an approaching train, but was unable to do so in time to prevent a collision. The plaintiff also introduced evidence tending to show that the crossing was established about a year before the accident, by section men, with the consent of Matthew R. Mann, the owner of the land. He testified:

"The section boss or some of the men came to me and asked for permission to change the crossing from my farm crossing to the crossing now used. I gave my consent, and the crossing now used was put in. It was built of poles, I think, two, three or four inches thick. Do not know how long bridge had been there, but think about a year."

The plaintiff also offered evidence to show by one T. F. Rogers, that the crossing was put in pursuant to an agreement between Rogers and the "road boss." Rogers testified:

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"The crossing was established where it now is when the road was fenced, by an agreement between me and a man I understood to be the 'road boss.' I was not an officer at the time, and do not remember the name of the 'road boss.' The next time I passed there I saw the crossing was put in. The name was given me by Milt Ewing."

The testimony of Matthew R. Mann and T. F. Rogers was admitted over the defendant's objections. Under the instructions given by the court the jury found for the plaintiff, and the defendant appealed.

M. A. Low for appellant.

Hicklin, Taylor and Callison for respondent.

PER CURIAM.—In our opinion plaintiff has no right of action or standing in court. The defendant owed no duty to him even if the crossing were defective or out of repair. In addition to that, the defect, if any, does not appear to have been brought to the notice of the company, or that the defect had existed for a sufficient time from which to presume notice to the defendant.

If the party, for whose benefit the crossing was built had, in like circumstances been injured, a different question would, perhaps, be presented, not necessary now to be considered. Judgment reversed.

JEFFRIES *et al.*, Appellants, v. BLECKMANN *et al.*

1. **Voluntary Assignment:** DEED, CONSTRUCTION OF. A deed of assignment professing to be made for the benefit of all the creditors of the assignor, whether named or not, although reciting, by way of consideration, the release of some of the creditors, but containing

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no stipulation that those only who have or shall sign the release shall share in the benefits of the assignment, does not fall within the rule that a deed of assignment is void which contains a stipulation for the release of the debtor, as a condition of receiving any benefit from the assignment.

2. —. Under our statute (W. S., p. 150, sec. 1), declaring every voluntary assignment of property to be for the benefit of all the creditors of the assignor in the proportion of their respective claims, it is unnecessary to mention the name or the amount of debt of a creditor to entitle him to a share in its proceeds.
3. —: SALE BY ASSIGNEE WITHOUT ORDER OF COURT. The sale of property by the assignee without an order of court does not render the sale fraudulent, nor does such fact affect the validity of the deed of assignment.
4. —: STATUTE. Where the statute relating to voluntary assignments for the benefit of creditors determines how the trust shall be administered, it will supersede details to that end contained in the deed.

Appeal from Franklin Circuit Court.—HON. A. J. SEAY, Judge.

AFFIRMED.

Crews & Booth for appellants.

(1) The conveyance to Grothouse was neither more nor less than a deed stipulating and providing for the release of each member of the firm from further liability, and was fraudulent and void against all the creditors not assenting thereto. *Brown v. Knox*, 6 Mo. 302; *Bradley v. Ames*, 50 Mo. 387. If the plaintiffs had proved up their claims under the deed and accepted *pro rata* payment of the same, they would have been estopped to dispute the release. *Valentine v. Decker*, 43 Mo. 583. (2) Respondents purchased with notice of the deed to Grothouse and are, therefore, chargeable in law with notice of that which they might have learned by an examination of such deed and of all the papers referred to therein. *Kerr on Fraud and Mistake* (Am. Ed.)

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240, *et seq.* (3) The two bills of sale, the deed of real estate and the release were executed together and constituted an entire transaction, of which each part contained a direct reference to every other part. Therefore, notice of one was notice of all said instruments. (4) No order for the sale and deeds to respondents having been made by the circuit court of Franklin county, or by the judge thereof, and no bond having been given for the sale of real estate, as required by law, it was an insufficient and invalid proceeding. The power of sale under the statute, if it ever existed, was never legally executed. See acts of 1875, p. 5, sec. 2. (5) The deed to Grothouse was not an assignment under the statute. (a) Because not made upon the consideration of providing for the payment of the debts of the assignors only, but upon a consideration in the nature of a contract releasing the assignors and Menkhous from further liability for debts of the firm. (b) Because it was a conveyance to the assignee upon a trust inconsistent with a statutory assignment, viz.: Upon trust, to run, use and operate a mill and other property thereby conveyed. Such a conveyance, upon its face, gave notice that it could not be valid except between the assignors, the assignee, and such creditors as actually consented thereto; and all having such notice were certainly bound to make reasonable examination as to the fact of such consent. (6) The qualification of Grothouse, and of Hibbeler and Wattenberg, as assignees of Bleckmann, Horn & Company, was not a qualification as assignees of Bleckmann & Horn alone, under the conveyance of the real estate, and, therefore, all their proceedings are, as to said real estate, void and insufficient to convey any title to the real estate.

E. T. Farish for respondents.

(1) The law invoked by plaintiffs has no applica-

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tion to the case at bar. The deed and bills of sale, and deed of release are part and parcel of one transaction and are for the use and benefit of all the creditors of Bleckmann, Horn & Company, whether enumerated or not. There is no rule which requires all the creditors of the debtor to join in the composition; two are sufficient to make it binding, except when the composition agreement itself stipulates otherwise. *Pierson v. McCahill*, 21 Cal. 611; *Reay v. White*, 3 Tyrwh. 596; *Goods v. Cheseman*, 2 B. & Ad. 327; *Bradley v. Gregory*, 2 Camp. 383; *Steinman v. Magrues*, 1 East, 390; *Paddlefield v. Thatcher*, 48 Vert. 574; *Diermeyer v. Hackman*, 52 Mo. 282; *Renard v. Fuller*, 4 Bosw. 107; *Way v. Sanglerg*, 15 Ohio St. 392; *McKenzie v. Culbrith*, 66 N. C. 534; *Sage v. Valentine*, 23 Minn. 102; *Cutler v. Reynolds*, 8 B. Mon. 599; *Perkins v. Durslinger*, 59 Ind. 27; *Devon v. Horn*, 17 Ind. 472; *Perkins v. Lockwood*, 100 Mass. 249; *Bliss v. Shwartz*, 65 N. Y. 444; *Wheeler v. Wheeler*, 16 Vt. 60; *Citizens' Nat. Bk. v. Richmond*, 121 Mass. 110; *Mathewson v. Strafford Bk.*, 45 N. H. 104; *Wilson v. Powers*, 130 Mass. 127. (2) The conveyances were assignments with special provisions, but were for the benefit of all the creditors of the debtors, and were valid under our assignment law, so treated and carried out. That law provides a scheme for administering all such trusts, and an exclusive method. *Burrill on Assignments*, secs. 184, 192 and 193; *Crow v. Beardsley*, 68 Mo. 438; *Hardcastle v. Fisher*, 24 Mo. 70. (3) It was incumbent on Coleman, if he did not intend to stand by the assignment, to have taken steps in due time to set the same aside. He should not have waited until the property was sold by the assignee to an innocent purchaser. *Whitmore v. Hastings*, 51 Mo. 171. (4) There is no provision or stipulation for a release of the debtor as a condition for receiving the benefit of the deed, or any reservation of property which ought

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to have been devoted to the payment of their debts, to their own private benefit or use. Such an assignment was perfectly legal and valid. Burrill on Assignments, secs. 192, 3; *Brown v. Knox*, 6 Mo. 302; *Diermeyer v. Hackman*, 52 Mo. 382.

BLACK, J.—On the second and eleventh days of December, 1875, Bleckmann, Horn & Menkhaus, partners in the milling business, under the name of Bleckman, Horn & Co., were largely indebted and were insolvent. They then made two bills of sale, one of personal property and the other of an interest in a steamboat to Grothouse. Two of the partners also made to the same person a deed of the milling property. These conveyances were all made to Grothouse in trust for their creditors. The trustee gave bond as an assignee, inventoried the property, had the same appraised, allowed demands and paid dividends thereon. He sold the real estate without an order of court to Soltrop and Schegmann for \$15,345. He resigned and the circuit court appointed two other persons assignees in his stead, who received the purchase money and made a deed of the real estate to these purchasers, who were in possession when this suit was brought. These deeds, and the bills of sale are alleged to be fraudulent, as against the plaintiff, and this is a suit to set aside and cancel the same, for that reason.

The deed to the trustee was duly recorded on the third of January, 1876, and the sale of the real estate was made by the assignee on the twenty-fifth of that month. Subsequently, and in April, 1876, the plaintiff, Coleman, recovered a judgment before a justice of the peace for \$12.60, a transcript of which was filed with the clerk of the circuit court upon which execution was issued and under it plaintiff purchased the real estate for \$1,500. This is their title. Jeffries and Davis, the other plaintiffs, were also creditors of Bleckmann, Horn & Company, to the

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amount of about one thousand dollars. They did not prove up their demand before the assignee.

1. These bills of sale, as they are called, as well as the deed to the real estate, were all executed and acknowledged, as required by the assignment law. They were all parts of the same transaction and are to be treated the same as if one instrument. They constituted a conveyance of the property, real and personal, to the trustee, absolutely, for the payment *pro rata* of all of the debts of the assignors, and were properly regarded and treated as an assignment for the benefit of the creditors. Two public meetings were held by the creditors and these documents, as well as the release hereafter mentioned, were executed as the result of their deliberations. There is no evidence of any actual fraudulent purpose whatever on the part of the assignors' trustee, or any of the creditors. If the assignment was fraudulent, it is not because of any evidence *aliunde*, but because it is fraudulent, as a matter of law, on the face of these deeds.

The contention is that the assignment is fraudulent, as to some of the creditors because the deeds require a release from creditors in order to participate in the fruits of the assignment. The three instruments are substantially the same. The title to the real estate, it would seem, was in Bleckmann and Horn, and they, with their wives, executed this deed. It recites the names of a large number of creditors of Bleckmann, Horn & Company, the execution and delivery of the two bills of sale; that said creditors had executed to the debtors a release from any and all indebtedness, and in consideration of such release and of the agreement of said creditors to surrender or destroy the evidences of such indebtedness, and of one dollar paid by the trustee, conveys to him the milling property, in trust for the creditors, as follows: "First, to run and operate such mill and other property in such manner as shall be for the best interests of all the creditors of the said firm of Bleck

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mann, Horn & Company, *whether hereinbefore enumerated, mentioned or not.* Second, to sell and dispose of the said property herein and hereby conveyed in such manner and on such terms as a majority in number and amount of the said creditors may direct, at public or private sale, and, after deducting all reasonable costs and expenses attending the same, pay *pro rata* on the demands of said creditors * * * it being distinctly understood that this conveyance is made for the benefit of all the creditors of said firm of Bleckmann, Horn & Company, and not for the purpose of giving any creditor a preference over another."

It has been several times held in this state that an assignment, containing a stipulation for the release of the debtor as a condition of receiving any benefit, is void as to the creditors not consenting thereto. *Brown v. Knox*, 6 Mo. 302; *Drake v. Rogers*, *Id.* 317; *Bradley et al. v. Ames*, 50 Mo. 387. And the same rule prevails in New York. Burrill on Assignments, section 192. But does this deed fall within the rule? Here a number of creditors, nearly all of them, did execute such a release at and prior to the delivery of the deed of assignment. If they saw fit to do this, to get what contingent dower interest the wives of the assignors might have in the real property, and to avoid the consumption of the property by way of costs in bankruptcy proceedings, as seems to have been the motive, that alone would not render the assignment fraudulent. The deed professes to be made for the benefit of all the creditors, whether named or not. The release by certain creditors is recited by way of consideration in part. But there is no stipulation that those only who have or shall sign the release shall share in the avails of the assignment. We do not understand the deed to contemplate such a condition. The plaintiff, Coleman, was not recited as a creditor at all, but that was wholly immaterial. Our statute, then in force, declared that every voluntary assignment should be for the

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benefit of all the creditors of the assignor in proportion to their respective claims. It was wholly unnecessary to mention the name or amount of debt of any creditor. Those not mentioned were not prejudiced in the least.

Though Jeffries and Davis, the other plaintiffs, were mentioned, still they did not sign the release, nor were they bound so to do. These plaintiffs could have proved up their demands, as other creditors did, and have shared in the dividends. It seems to be contended that by so doing and receiving a dividend they would surrender whatever balance might be due on their demands. This is a misconception of the terms of the deed, as we have seen. It contemplates no such results as to those creditors who had not already, at the time of the assignment, executed the release.

2. While the assignee sold the property without an order of the court, that does not render his sale fraudulent, nor does it affect the validity of the deed of assignment, and no other questions are presented by this record. It may be added that the statute, with respect to voluntary assignments, determines how the trust shall be administered, and in this respect supersedes details to that end in the deed of assignment.

The bill and the case made therein is without merit. The judgment of the circuit court should be affirmed. It is so ordered. All concur.

CLOUD V. THE INHABITANTS OF THE TOWN OF PIERCE
CITY, *Appellant*.

1. **Municipal Corporation, Chief Officer of: STATUTE.** The chairman of the board of trustees of a town, incorporated under

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the General Statutes of 1865, chapter 41, page 239, is the chief officer of such town.

2. ——— : SERVICE OF PROCESS : JUDGMENT BY DEFAULT. In order to support a judgment by default against a corporation, it must appear of record that the person, who, the return of the officer shows, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation.
3. ——— : ———. There are no statutory provisions in this state regulating the service of process upon cities or town, and in the absence of such provisions, the manner of service still remains as at common law, and must be upon the mayor or other chief officer.
4. **Statutory Construction** : GENERAL STATUTES, 1865, CHAPTER 62 Chapter sixty-two, of the General Statutes of 1865, relates only to private corporations, and has no application to municipal corporations, and section thirty-four of this chapter does not relate to mesne, but only to final process.
5. **Process, Constructive Service of** : NOTICE. The doctrine of constructive service of process or notice is altogether the creature of statutory enactment, and has no existence, except where expressly declared by the law-making power.
6. **Judgment Without Process**. Where a party has not been brought into court by service of any process, a judgment rendered against him is *coram non judice* and void.
7. **Process, Jurisdictional Recital of in Record, Contradiction of**. Although the record contains the jurisdictional recital that "defendants have been duly served with process," it is competent to overthrow such recital by showing, by other parts of the record of equal dignity and importing equal verity, that such recital is untrue. And the return of the sheriff is a part of the record itself, and may, when radically defective, be used to rebut the presumption arising from recitals of service contained in other portions of the record.
8. **Jurisdiction : PROCESS : JUDGMENT**. Generally, the recital of jurisdiction or of service of process contained in the judgment will be construed in connection with the whole record, and will be deemed to refer to the kind of service shown by the other parts of the record.
9. ——— : ——— : ———. Where judgment has been rendered against a defendant corporation upon insufficient process, and the successor of such corporation appears in court and moves, for that reason, to set aside the judgment and asks leave to plead to plaintiff's petition,

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which is denied, such action does not, by relation, give jurisdiction where none existed before, nor confer on the judgment rendered a retrospective validity.

10. **Municipal Corporation : MANDAMUS.** Mandamus cannot issue against a municipal corporation until the claim on which it is based is first reduced into judgment : and this is necessarily so, where the mandamus proceedings are wholly based on Revised Statutes, section 2415, requiring that an execution against a city, etc., be first returned unsatisfied before mandamus can issue.

Appeal from Lawrence Circuit Court.—HON. M. G. McGREGOR, Judge.

REVERSED.

Henry Brumback for appellant.

(1) The court had no jurisdiction of the person of the defendant. The summons was not served upon the chief officer, mayor, or "chairman of the board of trustees," as he was termed by chapter 41, page 240, General Statutes, 1865. "Process must be served on the mayor or other head officer." Tidd's Prac. 121; *McQueen v. Mfg. Co.*, 16 Johns. 6. In this case against a town there must have been an actual personal service, as laid down by Tidd, and provided by the Laws, 1875, page 105, in order to give jurisdiction of defendant. Constructive service can give jurisdiction only by virtue of express legislation and then "the essentials of the statute ought to be complied with." *Hewitt v. Weatherby*, 57 Mo. 276; *Stewart v. Stringer*, 41 Mo. 400; *Fisher v. Frederick*, 33 Mo. 612; *Smith's Adm'r v. Rollins*, 25 Mo. 408; *Schelt v. Leland*, 45 Mo. 293. To sustain default against a corporation it must appear that service of process was had upon some person occupying such relation to the corporation that they could legally serve upon such person. *Oxford Iron Company v. Spradley*, 42 Ala. 24; *Ins. Co. v. McCullough*, 42 Ala. 657. The court having no jurisdiction, the judgment is not merely

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irregular, but is absolutely void. (2) The recital in the entry of judgment, that defendant was duly served with process, may be contradicted by other portions of the record, and the whole record may be considered together. The writ and endorsements thereon, down to the judgment itself, inclusive, is a part of the record and is open to examination. *Vandenbush v. Lane*, 4 Ran. 413; *Wainright v. Harper*, 3 Leigh, 270; *Harrison v. Hardeman*, 14 How. 338. The sheriff's return is a part of the record itself. *Rumfelt v. O'Brien*, 57 Mo. 572. The presumption in favor of the jurisdiction of superior courts necessarily ceases when the proceedings themselves negative the existence of jurisdiction. When, therefore, the record shows expressly or by necessary implication that the court has proceeded without notice to the parties, the judgment will be void, and may be disregarded as such in any collateral proceeding in which it is called in question. *McKee v. McKee*, 2 Harris, 231; *Moreau v. Killegrew*, 2 Yerger, 333; *Babbitt v. Doe*, 4 Ind. 355; *Sanford v. Sanford*, 28 Conn. 6; *Hiss v. Cole*, 3 N. J. 116; *Tunis v. Witheron*, 10 Iowa, 305; *Smith v. Rice*, 11 Mass. 507; *Eaton v. Badger*, 33 N. H. 226; *Denning v. Corwin et al.*, 11 Wendell, 648; *Schneider v. McFarland*, 2 Comstock, 450. The principle remains untouched, that whenever the want of jurisdiction "appears the judgments of any and all courts will be void." *Bloom v. Burdick*, 1 Hill, 141. (3) The appearance of defendant after judgment did not validate the judgment. *Huff v. Shepard*, 58 Mo. 246; *Smith's Adm'r v. Robbins*, 25 Mo. 408; *Lincoln v. Hilbus*, 36 Mo. 149; *Schell v. Leland*, 45 Mo. 293. Mandamus cannot issue until the claim is in judgment. *State ex rel. Rogers v. Hug*, 44 Mo. 116; *State ex rel. White v. Clay Co.*, 46 Mo. 231. (4) Even if the judgment were not void and did not need to have been first revived or sued on, still the court erred, for the reason that no alternative writ had been issued, but a

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peremptory writ in the first instance. Even *State ex rel. Cassidy v. Slavens et al.*, 75 Mo. 508, which holds that a petition is not necessary, recognizes the fact that plaintiff must first call for an alternative writ. An alternative writ must first issue. *Dillon on Corp.*, sec. 694; 6 Mo. 563; *Supervisors v. United States*, 4 Wallace, 436; *Riggs v. Johnson County*, 6 Wallace, 185; *Moses on Mandamus*, 209. Motion to set aside the writ is the proper practice. *People v. Everett*, 1 Caines, 8.

N. Gibbs for respondent.

The manner of the service of process on incorporated towns at the time service was had in this case was provided for by General Statutes, 1865, page 330, sections 23, 24, 25, 26, and service in this case was in the exact manner prescribed in said sections, and was valid. (2) But even if it should be held that the manner of service was defective, yet it would not be a total absence of service, but an attempted and irregular service of process. In case of an attempted service of process the presumption exists that the court considered and determined the question of its sufficiency or insufficiency, and its finding, though erroneous, cannot be void. *Freeman on Judgments* (2 Ed.) sec. 126, and cases cited. (3) In the original judgment the court found that defendant had been duly served with process and "findings of service by the court are as conclusive on the parties, in all collateral proceedings, as any adjudication of the court can be." *Freeman on Judgments* (2 Ed.) secs. 130, 131, and citations; *Dunham v. Wilfong*, 69 Mo. 355; *Fulkerson v. Davenport*, 70 Mo. 541; *Reed v. Whitton*, 78 Ind. 579; *McCauley v. Fulton*, 44 Cal. 355; *Quivey v. Baker*, 37 Cal. 465; *Coit v. Haven*, 30 Conn. 199; *Lessee v. Whiteman*, 2 Ohio St. 270; *Richards v. Skiff*, 8 Ohio St. 580; *Cary v. King*, 49 Iowa, 365; *Drig's Adm'r v. Abbott*, 27 Vt. 581; *Abbott v. Coburn*, 28 Vt. 663; *Crepps v. Durdan et al.*, 1 Smith's Leading Cases, part 2 (6 Am. Ed.)

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side page 826. (4) On the second of March, 1880, the City of Pierce came into court by its attorney, as the successor of the town of Pierce City, made itself a party, and from that day the court's jurisdiction over defendant and of the merits of the defence must be considered as adjudicated and conclusively determined. (5) Peremptory mandamus is the appropriate remedy to enforce the payment of a judgment against a municipal corporation, and is expressly provided for in certain cases by our statutes. R. S. 1879, secs. 2415, 2416, 2417. The writ of mandamus was in exact compliance with the statutes, was in proper form and properly served, and should be enforced. *Frank v. San Francisco*, 21 Cal. 697; *Olney v. Harvey*, 50 Ill. 453; *Coy v. Lyons City*, 17 Iowa, 1. (6) It is no defence that the warrant sued on "was issued by a fraudulent board of trustees." "The acts of officers *de facto* are as valid and effectual, where they concern the public or the rights of third persons, as though they were officers *de jure*." *Woodside v. Wagg*, 71 Me. 207; *Hussey v. Smith*, 99 U. S. 20; *Shcehan's Case*, 122 Mass. 445; *Commonwealth v. Hawkes*, 123 Mass. 524; *Sharp v. Thompson*, 100 Ill. 447; *State v. Bates*, 36 Vt. 396; *Snyder v. Schrau*, 59 How. Pr. (N. Y.) 404.

SHERWOOD, J.—I. The first point for consideration is, whether in contemplation of law any valid process was had on the inhabitants of the town of Pierce City, authorizing a judgment to be rendered against that corporation on the lost warrant. The defendant was incorporated under the provisions of the general law (General Statutes, 1865, chapter 41, page 239), and the chairman of its board of trustees was its chief officer. *Ib.*, page 243, section 18. The service of the summons which issued to bring the defendant before the court was had on July 8, 1875, and the return on the summons is in this form:

"Executed the within writ in the county of Law-

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rence and state of Missouri, on the eighth day of July, 1875. by leaving a true copy of this writ with a certified copy of plaintiff's petition attached thereto, at the business office of defendant, in the town of Pierce City, in Lawrence county, Missouri, with Gabe C. Jones, the person having charge thereof, the said Gabe C. Jones also being clerk of the board of trustees of said town of Pierce City, and having charge of the records thereof, the president of said corporation and all other chief officers thereof, being absent and not found by me in said county.

"J. B. DAVIS,
"Sheriff Lawrence County."

At common law, process was served on a corporation through its mayor or other head officer (1 Tidd, 121), as being the "most visible part of the corporation." The judgment rendered in this case was by default. In order to support such a judgment, it must appear of record that the person who, the return of the officer shows, was served with process, has such a relation to the corporation, that service on such person was tantamount to service on the corporation. *Oxford Iron Co. v. Spradley*, 42 Ala. 24; *Talladega Ins. Co. v. McCullough*, *Ib.* 667. Nothing of this kind appears in this record, going to show the service of process valid; and clearly it possesses no validity, unless shown to be warranted by statute. Under the provisions of the statutes, process is properly served on the clerk of a county court where suit is brought against a county. R. S. 1879, sec. 3489. And this has long been the law in this state. G. S. 1865, p. 225, sec. 6; R. S. 1855, p. 503, sec. 8; *Weil v. Greene Co.*, 69 Mo. 281. But I find no similar statutory provision regulating service of process on cities or towns. Chapter 62, General Statutes, 1865, to which counsel refer, as supporting the position that the service had in the present instance is valid, is a chapter entitled

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"Private Corporations," and the whole framework and structure of the chapter denote that the title chosen was not inaptly chosen. Thus section twenty-four, of chapter sixty-two, of the General Statutes of 1865, on which plaintiff relies, and upon which his return of service is based, in terms relates to "any banking or other incorporated company," and makes provision for service on the "president or other chief officer of such company," and makes further provision, that "if the corporation have no business office in the county where suit is brought," etc., that then a "summons shall be issued, directed to the sheriff of any county in this state, where the president or chief officer of such company may reside or be found, or where any office or place of business of such company may be kept, and the service thereof shall be the same as above."

Now, it seems to me, that it can but be obvious that this section was only intended to apply to incorporated companies, and that it must be held so to apply, if the terms used are to be taken in their ordinary import, and their usual and literal signification. It must be obvious, too, that this section cannot be held applicable to municipal corporations for the additional reason that whenever a municipal officer ceases to reside in the municipality of which he is the chief officer, that thereby all his municipal functions would thereupon cease, so that no service could be had upon him, but service could be had upon the chief officer of any "incorporated company," by the very terms of the section, in any county in this state where such officer may reside or be found.

Section twenty-six of the same chapter, also, bears out the same idea, for its provisions are: "Suits against corporations shall be commenced either in the county where the cause of action accrued, or in any county where such corporations shall have, or usually keep, an office, or agent, for the transaction of their usual and customary

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business." For the plainest reasons, this section cannot apply to municipal corporations. Nor is the conclusion just announced at all affected or controlled by section thirty-four, of the same chapter, as follows: "Nothing contained in this chapter shall be construed to extend to any county or township, or to any public university, academy, seminary, or school, incorporated by the laws of this state." This section does not relate to mesne process, but to final process. The reason for its enactment in its present form is shown by section seventy-seven, of chapter one hundred and sixty, General Statutes, 1865, where it appears for the first time, and was in force at the time of the institution of this suit, which allows mandamus proceedings against "any incorporated town or city" in the event of an execution issued against it. And, doubtless, the object had in view by the legislature, when, in the revision of 1845, it amended section thirty-four, already quoted, as it now stands, by omitting from that section, as it stood in the statutes of 1835, the words "city, borough, town, or village, or other public municipal corporation" (Statutes, 1835, page 127, section 16), was to enable executions to issue against such corporations which, if the section had remained as originally enacted, could not have been issued. This I regard as the only reasonable construction which can be placed on the statutory provisions relied on by plaintiff's counsel.

Nor is there any difficulty, as is suggested, in the way of obtaining service on municipal corporations. The manner of service still remains as at common law; and this, so far as I am aware, has been the method pursued in this state in obtaining service on such corporations. Viewing the matter in this light, finding no statutory provision changing the method of service in instances of this sort, it must be ruled that service of process in the case at bar should have been had on the "chairman of the board of trustees," he being the head officer of the town, and that the attempted constructive service on the clerk

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of the board, since not authorized by law, was invalid, and must be for naught held and esteemed. The doctrine of constructive service of process or notice is altogether the creature of statutory enactment, and has no existence but where expressly declared by the law-making power. *Leach v. Cargill*, 60 Mo. 316.

II. It seems quite needless to say that defendant not having been brought into court by service of any process, the judgment rendered against it is *coram non judice*, for it is among the fundamentals of the law that before the rights of a party can be passed upon, he must have his day in court. As is forcibly observed by Livingstone, J. : "A sentence thus obtained, in defiance of the maxim '*audi alteram partem*,' deserves not the name of a judgment." *Hitchcock v. Aicken*, 1 Caines, 473. To hold otherwise would be equivalent to ignoring that great constitutional principle which forbids that any one be "deprived of life, liberty, or property without due process of law."

III. But it is strenuously insisted that the judgment, in any event, is not open to collateral attack for several reasons which I will presently notice. It will be assumed as a basis for the discussion of the reasons offered by plaintiff in support of the judgment recovered by him, that where the record of a court of general jurisdiction is silent, and nothing appears thereon showing lack of jurisdiction, jurisdiction, as a matter of law, will be presumed when collaterally called in question. *Huxley v. Harold*, 62 Mo. 516, and cases cited. "Nothing shall be intended to be out of the jurisdiction of a superior court, but which specially appears to be so." *Peacock v. Bell*, 1 Saund. 73. The record recites that the "defendants have been duly served with process at least fifteen days before the first day of this term." The best considered cases, and numbers of them, hold, notwithstanding such jurisdictional recital, that it is competent to overthrow and countervail it by other parts of the record of

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equal dignity and importing equal verity that such recital is untrue. Wells on Jurisdiction, secs. 82, 87, and cases cited; *Harris v. Lester*, 80 Ill. 307; *Coit v. Haven*, 30 Conn. 190; Freeman on Judgments, secs. 24, 25; *Granger v. Clark*, 22 Me. 128; *Prince v. Griffin*, 16 Ia. 552; 2 Smith's Lead. Cases, 842; *Hewitt v. Weatherby*, 57 Mo. 276; *Harris v. Hardeman*, 14 How. 334, and cases cited; *Raley v. Guinn*, 76 Mo. 263. The return of the sheriff is a part of the record itself and may, where radically defective, be used to rebut the presumption arising from recitals of service contained in other portions of the record. But so far as concerns courts of general jurisdiction, and of that class I now speak, it matters not whether such recitals be made of record or not. They add nothing to the verity which attends as an inseparable incident such records. *Coit v. Haven*, *supra*; Freeman on Judgments, sec. 132.

IV. But it is urged that there has been a "finding of jurisdiction" in the case at bar, and, therefore, such finding is conclusive against all further inquiry touching the truth of such finding. It was shown by the circuit clerk, the custodian of the records, that there was but one summons, and but one sheriff's return thereon in this cause. Presumptions would certainly arise from this state of facts that the sheriff has served and returned all writs in the cause to him directed, and that the clerk has faithfully kept the same, and that the one exhibited on the trial, being part and parcel of the judgment roll, which, in this instance, is complete, was the only summons ever issued therein. There is a lack of harmony in the authorities respecting the force and effect of jurisdictional findings, some going so far as to hold a finding of this sort paramount to all other portions of the record, and as raising an un rebuttable presumption that the finding is absolute verity. *Hahn v. Kelly*, 34 Cal. 391; *Reily v. Lancaster*, 39 Cal. 354. In the cases just cited the findings as to service had were

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couched in the general and ordinary terms courts are accustomed to use. The case of *Hahn v. Kelly*, *supra*, was followed in that of *Blaisdell v. Pray*, 68 Me. 269. It is difficult to see, if the doctrine announced in the cases referred to is to prevail, what possible benefit it would be to a party desiring to attack a judgment collaterally to introduce the whole record, showing thereby no service of process or one unwarranted by law, if he is to be met at the very threshold of investigation by a general recital of service, conclusive in its nature, which arrests investigation and cuts off debate. Instances, doubtless, might arise where a return of *non est* on process, or even an insufficient return thereon tantamount thereto, would be remedied by a special recital made of record that the party personally appeared, or appeared by attorney, etc.; but, surely, anything short of this thwarts and renders of no effect the rule which takes the whole record, and upon full examination thereof, determines whether or not jurisdiction was indeed and in truth acquired.

On this point, Mr. Freeman observes: "But no presumptions in support of the judgment are to be allowed in opposition to any statement contained in the record. If an act be stated in the roll as having been done in a specified manner, no presumption arises that at some future time the act was done in a more efficient manner. If it appear that the process was served in a particular mode, no other and different service can be presumed. To indulge such a presumption would be to contradict the record, which imports absolute verity. When, therefore, the record shows that certain steps were taken to procure jurisdiction and the law does not consider those steps sufficient, the judgment will be regarded as void for want of jurisdiction over the defendant." Freeman on Judgments, sec. 125. And the learned author, after referring in a subsequent section to the cases in California, already noticed, speaks

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of them as having carried "the effect of jurisdictional findings to its utmost limit, and further, perhaps, than is justified by the more recent adjudications," and then, after reiterating, in substance, the doctrine already quoted, says: "Generally the recital of jurisdiction or of service of process contained in the judgment will be construed in connection with the whole record and will be deemed to refer to the kind of service shown by the other parts of the record. * * * If an attempt at notice appears in the record the finding, if a general one, refers to and is limited by such attempted notice." *Ib.* section 130. This view of the law, as to the probative force of such general recitals, finds ample support elsewhere. *Mickel v. Hicks*, 19 Kan. 578; *Mayfield v. Bennett*, 48 Iowa, 194.

The case of *Rumfelt v. O'Brien*, 57 Mo. 569, decides nothing to the contrary of this, for there, though the recital in the judgment was that the defendant was "duly served with process," yet it is distinctly and pertinently stated, "that nothing is here to show that the several fragments exhibited in evidence constituted the whole record of the Union Bank case." The case of *Dunham v. Wilfong*, 69 Mo. 355, cited for plaintiff, follows in the wake of the previous case, but the remark made in that case as to the conclusive effect of a general jurisdictional recital was sheer *obiter*, since the officer was permitted to amend his return to the writ, thereby showing full and complete jurisdiction over the parties and obviating any necessity for discussing the effect of the recitals contained in the judgment. For the reasons aforesaid, I am persuaded that the general recitals of service of process contained in the record, now before the court, should not be allowed to show the acquisition of jurisdiction over the defendant, but should only be taken as referring to the invalid service of process shown by the judgment roll, but this, as already announced,

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gave the circuit court no jurisdiction *in personam* over the defendant.

V. And the result thus announced is not in any manner affected by reason of the fact that the City of Pierce, the successor of the defendant (R. S. 1879, sec. 4385) having organized as a city of the fourth class, appeared on the second of March, 1880, by its attorney, and moved to set aside the judgment against the defendant, as having been obtained on insufficient service, and asking leave to plead to plaintiff's petition, and asserting that it had a good and valid defence to plaintiff's cause of action, etc. The City of Pierce, under the provisions of the statute cited, no doubt, became the successor of the defendant corporation; but this change did not affect the suit then pending. *Ib.*, sec. 4386. Nor is that result affected by the denial by the court of the motion to vacate and to be permitted to plead; nor by failure of the city to except or to appeal. Neither the action of the city, nor of the court thereon, could, by relation, give jurisdiction over the defendant where none existed before, or confer on the judgment rendered a retrospective validity. The only instance that I am aware of where the subsequent appearance of a party has such an effect is where a party having been served by publication and judgment rendered appears within the statutory period and files a petition for review, in which case, if he fail within the time limited him to answer or demur to the original petition, the judgment he seeks to review is made absolute. R. S., secs. 3687, 3688.

VI. Holding that the judgment recovered by the plaintiff is void, necessarily results in a reversal of the judgment in the mandamus proceedings; for mandamus cannot issue against a municipal corporation until the claim, on which it is based, be first reduced into judgment. *State v. Clay Co.*, 46 Mo. 231; *State v. Trustees, etc.*, 61 Mo. 155. And this is necessarily true where, as here, the proceedings for a mandamus are wholly based

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on section 2415, requiring that an execution against a city, etc., be first returned unsatisfied before mandamus can issue. *State v. Slavens*, 75 Mo. 508.

VII. This cause has come up to us in very irregular shape, being entitled as of the original action, instead of being entitled in the proper way. In so far as concerns the proceedings in mandamus, we reverse the judgment, and dismiss the writ and all its incidents. All concur.

THE STATE V. HOLCOMB, *Appellant*.

1. **Criminal Practice: GRAND JUROR, CHALLENGE OF.** The challenge of a grand juror can be made only on the ground that the juror is the prosecutor or complainant, or a witness on the part of the prosecution. R.S., secs. 1772, 1773.
2. ———: **CHANGE OF VENUE.** The finding of the trial court in a criminal case, on the question of the prejudice of the inhabitants of the county, on the hearing of an application for a change of venue, will not be interfered with by the Supreme Court, unless palpable injustice has been done the defendant.
3. **Policeman: PROOF OF OFFICIAL CHARACTER.** It is only necessary, in order to show that one was a policeman, in a city of the fourth class, to prove that he acted and was recognized as such officer. It is unnecessary to produce his official appointment as policeman.
4. **Criminal Law: EVIDENCE.** On the trial of one for murder, it is not competent for him to show by his statement, made at the time he purchased the pistol with which he killed the deceased, that his purpose in buying it was to kill mad-dogs.
5. **Cities of Fourth Class: POLICEMAN: RIGHT TO MAKE ARRESTS.** A policeman in cities of the fourth class, in the absence of an ordinance giving him the authority, has no right, without a warrant, to arrest a person for carrying concealed weapons.
6. ———: ———: **MURDER.** Although the attempted arrest by the officer in such case was illegal, yet if the defendant killed the de-

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ceased with express malice, it constituted murder in the first or second degree, and not manslaughter.

Appeal from Bates Circuit Court.—HON. J. B. GANNT,
Judge.

REVERSED.

Parkins & Abernathy, T. W. Silvers, P. H. & A. T. Holcombe for appellant.

(1) The lower court erred in overruling defendant's challenge of the grand jury. 4 Crim. Law Mag. 171; *State v. Bleekly*, 18 Mo. 428; *State v. Welsh*, 33 Mo. 33; *State v. Cornell*, 49 Mo. 282; *State v. Brown*, 64 Mo. 368. (2) The evidence on the question of the prejudice of the inhabitants of the county showed defendant was entitled to a change of venue. 5 Crim. Law Mag. 797; *State v. Nash*, 7 Ia. 347. (3) The court erred in admitting in evidence the records of the city of Butler, and, also the oral testimony of witnesses that Aleshire acted as night watchman. In cities of the fourth class, the office of night watch, or patrol, must be created by ordinances of the board of alderman. R. S., sec. 4940; *Ex parte Snyder*, 64 Mo. 58. (4) The court erred in not permitting defendant to prove his object in buying the pistol. Whart. Crim. Evid., sec. 753; *State v. Monroe*, 5 Ga. 85; *State v. O'Conner*, 11 Nev. 416; *State v. Ware*, 62 Mo. 601; *State v. English*, 67 Mo. 136; *Thorndike v. Boston*, 1 Met. 242; *People v. Arnold*, 15 Cal. 476; 1 Greenl. Ev., sec. 108. (5) The fifth instruction for the state told the jury that if defendant had concealed upon his person in the presence of Kelly a deadly weapon, and that Kelly had reasonable ground to believe that defendant had such concealed weapon, Kelly had a right to make the arrest without a warrant. This was erroneous, as the right to arrest without a warrant is limited to misdemeanors occurring in the pres-

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ence of the officer, and at common law it has always been confined to affrays and breaches of the peace. *Quinn v. Heisel*, 40 Mich. 576; *State v. Beck*, 76 N. C. 10; 1 Bishop C. P., sec. 640; 9 Cent. Law Jour. 320. (6) The third and fourth instructions given for the state were erroneous. The former, because based on the theory of an unlawful assault, and both it and the fourth are inconsistent with the other instructions in the case. (7) Whether there was any express malice in the case was a question for the jury. If defendant, without malice or premeditation, in the heat of passion and in resisting a trespass, killed the deceased, he would be guilty merely of manslaughter. *State v. Edwards*, 70 Mo. 592.

D. H. McIntyre, Attorney General, for the state.

(1) The defendant was rightly put on his trial before the first indictment was formally quashed. *State v. Eaton*, 75 Mo. 586. (2) The finding of the trial court on the question of the change of venue is conclusive, in the absence of evidence to show manifest injustice was done the defendant. *State v. Sayers*, 58 Mo. 585; *State v. Whitton*, 68 Mo. 91; *State v. Gay*, 69 Mo. 430. (3) The records of the city of Butler, offered in evidence, were admissible. 1 Greenl. Evid., sec. 92; 1 Bishop Cr. Pr., sec. 1130; Whar. Cr. Ev., sec. 164; *State v. Roberts*, 52 N. H. 492; *Rex v. Gordon*, 2 Leach, 581. (3) The evidence offered as to defendant's statement concerning his purpose in buying the pistol was rightly excluded. It was incompetent and irrelevant. *State v. Evans*, 65 Mo. 579. (4) The state's third instruction properly declared the law. Although the attempted arrest may have been illegal, if the killing was done with express malice, it was murder, and if done with deliberation, murder of the first degree. *The State v. Johnson*, 76 Mo. 126; *Roberts v. The State*, 14 Mo. 138; *Rafferty v.*

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The People, 72 Ill. 37; 1 East P. C. 311. (5) So the state's fifth instruction was proper. 1 Greenl. Evid., sec. 92; *State v. Green*, 66 Mo. 631. In attempting to shoot Kelly, he was guilty of attempting to commit a felony, and it was the duty of the deceased to interfere to prevent it, even if he were a private person, and he was entitled to the same protection as though he were an officer. 1 Bish. Cr. Proc., sec. 165 (3 Ed.); 1 Whar. Cr. Law, sec. 433 (8 Ed.); Foster's Crown Law, 309. Whether deceased were a private person or an officer, the defendant was guilty of murder in killing him, he having a right to interfere, and proceeding according to law. 2 Bish. Cr. Law, sec. 652 (7 Ed.). And if Kelly, under the circumstances, named in the instructions, was attempting to arrest defendant and defendant shot at him, and by mistake or accident killed the deceased, he is guilty of murder. 1 Bish. Cr. Law, sec. 328 (7 Ed.); *Golliher v. Commonwealth*, 2 Duval (Ky.) 163; *The King v. Plummer*, 12 Modern R. 627; *Angell v. State*, 36 Tex. 542; *State v. Raymond*, 11 Nev. 98. (6) The instructions refused for defendant should not have been given. (7) This court will not disturb the finding of the trial court as to the charge of prejudice against the juror, James Collier. The evidence must clearly preponderate against the juror. A mere doubt of his impartiality is not enough. *Davison v. People*, 90 Ill. 221; *State v. Dumphey*, 4 Minn. 438; *State v. Ayers*, 23 N. H. 301; *Moncrief v. State*, 59 Ga. 470; *Nash v. State*, 2 Tex. App. 362. If the examination of the juror, upon his *voir dire*, covers the evidence impeaching his incompetency, it is but an oath against an oath, and the court will be slow to impute perjury to the juror. Thompson and Merriam on Juries, sec. 304, p. 346; *Epps v. State*, 19 Ga. 102; *Hudgins v. State*, 61 Ga. 182; *Com. v. Hughes*, 11 Phila. 430; *Nash v. State*, 2 Tex. App. 362.

BLACK, J.—Defendant was indicted at the March

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term, 1883, of the Bates circuit court, for the murder of Aleshire. A second indictment was preferred at the following June term, and the first was thereby superseded and properly quashed. There was a mis-trial, then an application for change of venue, a second trial at the March term, 1884, and a verdict of guilty of murder in the second degree.

The evidence for the state tended to show that Aleshire, the deceased, and Kelly, were night watchmen, or police officers of the city of Butler. Kelly searched and took from defendant a pistol, a year or more before the killing. He also searched the defendant on several other occasions, but found no pistol, the last being about a month before the homicide. Defendant complained to the marshal and others, and insisted that these searches were unreasonable. About three o'clock, p. m., of the day of the homicide, he purchased a pistol, loaded it at Esquire Cannon's office, and by the friendly persuasions of the latter, left it there for a time. He got it again and left it at several other places during the day. There is evidence to the effect that he was drinking some, and had threatened to kill the police if they interfered with him again, of all which Kelly was notified during the day. About eleven o'clock at night, defendant got his pistol, started home, and on the way met with Kelly and Aleshire, who were on duty. Kelly's evidence of what then transpired is: "I said, Sumner, give me that pistol. He said d—n you, you wont get it. He then drew the pistol and presented it. Aleshire moved around to grab him, and just then the pistol went off. They fell to the sidewalk." On cross-examination: "Defendant threw his overcoat off, and ran back with his pistol drawn. He drew it out of his pocket after I demanded it."

The evidence for the defence tended to show that defendant purchased the pistol to protect himself and home, which was in the suburbs of the town, from mad

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dogs ; that he left the pistol at the several places during the day to avoid trouble on the streets, and that he had no dislike towards Aleshire, and that his dislike was towards Kelly only.

1. To the second indictment, the defendant filed a plea in abatement, on the ground that he was in custody and was not offered an opportunity to object to the grand jurors. Evidence was heard and the plea overruled. It is clear that the defendant was brought into court on the first day of the term, to the end that he might object to the grand jurors, as a plea of a like character had been interposed to the first indictment ; but it would seem the defendant did not understand that he was to be again indicted. The plea, however, was wholly insufficient and was properly overruled. Challenge to the array, or to any one of the grand jurors, is no longer allowed, except on the ground that the juror is the prosecutor or complainant, or a witness on the part of the prosecution. Secs. 1772, 1773, R. S. The plea does not claim that the jurors, or any of them, were objectionable for these, or indeed for any reason. It would be a mere idle ceremony to sustain the plea, when the defendant makes and has no valid ground for a challenge.

2. The application for a change of venue was based on the ground of prejudice of the inhabitants of Bates county. Much evidence was heard upon the one side and the other. The rule recently asserted is "that the finding of the circuit court on that issue is conclusive, and not to be interfered with by this court, unless it appears that palpable injustice has been done." *State v. Guy*, 69 Mo. 430 ; see, also, *State v. Wilson*, 85 Mo. 134. While the evidence shows a pretty strong leaning adverse to the defendant, in localities in the county, yet there is nothing disclosed which will warrant this court in interfering with the finding of the circuit court, guided by the rule above announced.

3. The state read in evidence an entry from the

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city records, appropriating fifteen dollars per month to pay a night watch, provided the citizens would pay the balance of his salary, and the night watch would act as deputy marshal; a subsequent order appointing him night watch at a specified salary, and various appropriations in payment of his salary, in which he is styled night watch and night police, and in some instances without any official designation. The marshal testified that he and the council appointed Kelly policeman and deputy marshal, and that Aleshire acted in the same position. Much other parol evidence was to the effect that they were recognized by the city officers and citizens as policemen, and that Aleshire was paid by the citizens. To all of which evidence the defendant objected.

It was not necessary to produce the official appointment of these persons, either as assistant marshals, policemen, or night watches. It was sufficient to show that they acted and were recognized as such officers. 1 Greenl. Evid. (13 Ed.) sec. 92; Wharton Evid., sec. 1315; *Wickersham v. Woodbeck*, 57 Mo. 59; *Bank of United States v. Dindridge*, 12 Wheat. 70. The law with respect to cities of the fourth class does not require that a policeman or deputy or assistant marshal shall be appointed in any particular way. A resolution or order, as was made as to Kelly, was all that was required. *Dillon on Mun. Corp.*, sec. 151.

4. Nor is there any merit in the point that the written dying declaration of Aleshire should have been produced, or if lost, the newspaper copy offered. He signed no written declaration. What he stated was partly, it is said, written down by another, but not signed, or even formally read to him. It would have been a good objection to reading this writing in evidence, had it not been lost and offered, that the witness who heard the declarations should be produced, to the end that he might be cross-examined. The writing

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was at most but a memorandum, made by the witness who heard the statements.

5. Wright, from whom the defendant purchased the pistol on the day of the homicide, was asked: "What did defendant say he was buying the pistol for?" The witness was not allowed to answer the question. It is fair to presume the purpose was to show that he said he was getting it to kill dogs. If this evidence is admissible at all it must be on the ground that the statement then made was a part of the *res gesta*. In Wharton on Evidence, section 259, it is said: "The *res gesta* may, therefore, be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act." They may consist of declarations of any one concerned in the particular act in question. Their admissibility depends much upon their direct relation to the act in question. If so disconnected as not to be explanatory of the act, or matter in issue, or so far prior as to give opportunity for their preparation, the declarations are inadmissible. *State v. Ware*, 62 Mo. 597; *State v. Dominique* 30 Mo. 585; *Green v. State*, 13 Mo. 382; *Stone v. Segur*, 11 Allen, 568. In *Evans Case*, 65 Mo. 579, the offer was to show what defendant said about an hour before the killing, and at a time when the deceased passed the wagon in which defendant and the witness were riding. It was held the declarations were not a part of the *res gesta*, and the evidence offered was open to the objection of allowing a party to manufacture evidence for himself. It is true the declarations here offered were made in connection with the purchase of the pistol, but they were no part of the litigated act, the homicide. They were prior thereto, and wholly disconnected. While incidents and declarations, unconsciously associated with the matter directly in issue, may be received, yet, to admit the declarations offered in this case, is to open wide the door to the party to make evidence for himself. On the first

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impression the evidence might appear to be admissible, but upon consideration it was clearly inadmissible, and, therefore, properly excluded.

6. The fifth instruction given for the state raised and presented pointedly the question whether Kelly, acting as a policeman, or watchman, could rightfully, without a warrant, arrest the defendant for carrying a concealed weapon in the presence of the officer. When and under what circumstances, a sheriff or constable may arrest, without a warrant, is reasonably well settled, for they are common law officers; but the same cannot be said of policemen or watchmen, and this is no doubt due to the fact that their powers are generally defined by statute or municipal ordinance. The powers of policemen to arrest with or without a warrant, in cities of the second and third class, are clearly defined by statute, and in the latter class, are equal to those of the marshal. The provisions of the statute with respect to these officers, in cities of the fourth class, the city of Butler being of that class, are as follows:

"Sec. 4998. The marshal shall be chief of police, and shall at all times have power to make or order all arrests, with proper process, for any offence against the laws of the state, or the city, by day or by night, and bring the offender to trial before the proper officers of the city, and to arrest without process in all cases where any such offence shall be committed or attempted to be committed in his presence."

"Sec. 4999. The policemen of the city, in the discharge of their duties, shall be subject to the orders of the marshal only as chief of police; but any marshal, assistant marshal, or policeman, may be removed by the board of alderman for any neglect of duty." There is the further general provision (sec. 5001) that: "The duties, powers, and privileges of all officers, of every character, in any way connected with the city government, not herein defined, shall be defined by ordinance."

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The first of these sections does not give to the marshal the power to arrest without a warrant for a past offence. It was so said in *State v. Underwood*, 75 Mo. 231; but it certainly does give him the power to arrest without a warrant for an offence committed in his presence. The powers of policemen and their duties, it will be seen, are not at all determined by the statute, but the right to fix and prescribe their duties rests with the mayor and board of aldermen. It would, we think, be competent for the mayor and board of aldermen, by ordinance, to give to the policemen the powers possessed by the marshal, in respect to arrests, certainly so as to all offences committed within the city limits, but no such ordinance relating to the duties of police officers was offered in evidence in this case. Nor does it appear that the defendant was about to be arrested for the infraction of any city ordinance, but the offence was one prohibited by the general law of the state. The case is wholly unlike that of *State v. Grant*, 76 Mo. 236. There the special act defined the powers and duties of the board of police commissioners, and it was the evident purpose of the act that those powers should be carried out by and through the policemen appointed by the board. Here, in cities of the fourth class, such officers, as well as watchmen and patrols, are recognized as proper officers in the administration of the affairs of the city. Their duties, however, are not defined by statute, but the duty of doing this is left to and required of the mayor and board of aldermen. What these powers and duties are, in the city of Butler, we cannot say, for there was a failure to put in evidence any ordinance in this regard, doubtless because there was none.

"From time immemorial, constables and watchmen had authority, without warrant, to arrest those whom they saw engaged in an affray, or breach of the peace, and to detain them until they should find proper security." *City Council v. Payne*, 2 Nott & McCord's R. 475.

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In the absence of any such ordinance, we might indulge in the presumption that those officers were invested with the general and usual authority to arrest those engaged, in their presence, in an affray or breach of the peace, as was done in *Doering v. The State*, 49 Ind. 60, but we can go no further in the face of these statutes. Without any ordinance, the right of this officer to arrest without a warrant, for such an offence as that here in question, was no greater than that of any other citizen. It is not pretended, nor can it be maintained, that a citizen could rightfully make such an arrest, or disarm a person, doing no more, at the time, than carrying a concealed weapon. The fifth instruction, therefore, should not have been given.

Although the attempted arrest, by the officer, was illegal, yet if the defendant killed deceased with express malice, the killing would be murder in the first or second degree, and not manslaughter in any of its degrees. *Roberts v. State*, 14 Mo. 138; *State v. Johnson*, 76 Mo. 123. There was evidence of express malice, and hence the third and fourth instructions, given at the request of the state, were proper.

Those instructions given for the state and defendant, and which are based on the theory of fact, that Aleshire and Kelly were not officers, were incorrect in this, that they are made to depend upon the hypothecated fact that they, Kelly and Aleshire, were not officers at all. Whether police officers or not, the attempted arrest was, for the reason before stated, illegal. In other respects those instructions are correct enough, and can readily be made to conform to these views. The other instructions given by the court, and not before noticed, are not objectionable. Defendant's eighth instruction should be given. The judgment is reversed and the cause remanded for new trial. Norton, J., concurs in the result. The other judges concur.

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SMITH *et al.* v. WARDEN *et al.*, *Appellants.*

1. **Partnership: NEGLIGENCE, LIABILITY FOR.** The defendants were sued as general partners, under the firm name and style of "The Hannibal Meat Company, Limited," for injuries resulting from the explosion of their steam boiler, while used by their employes. It was pleaded as a defence that the company was a joint stock company, organized under the laws of the state of Pennsylvania, and that, under said laws, the company, and not the defendants, as individuals, was liable to be sued for the injuries complained of. It appeared, on the trial, that there had been a failure, on the part of defendants and their associates, to file their articles of association in the proper recorder's office, in the state of Pennsylvania, as required by the statute of said state, until after the occurrence of the injury sued for. *Held*, that the defendants were rightly sued as general partners.
2. **Limited Partnership.** A full compliance with the laws of Pennsylvania, both as to the statements required to be made in the articles of association, and as to recording the same, was necessary and pre-requisite to the formation of the limited partnership in that state, and if the partners proceeded to do business before so complying with the law, they did so as general partners.
3. **Several Causes of Action.** Injuries caused by the explosion of a boiler, to furniture of the husband, and to his wife's person, are distinct, and afford grounds for different causes of action.
4. **Husband and Wife: PRACTICE: RECEIPT.** A receipt, by the husband, acknowledging satisfaction for the injury to the furniture, and for the payment by him of physicians' bills incurred by reason of the injuries to his wife, and for the expenses of a truss for her, is no bar to an action for the injuries to the wife's person.
5. ——. A husband, in the absence of authority from the wife, cannot now dispose of or settle her right of action for injuries done to her person. R. S., 1879, sec. 3296.

Appeal from Hannibal Court of Common Pleas.—HON.
JOHN T. REDD, Judge.

AFFIRMED.

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Easley & Russell, David H. Eby and R. E. Anderson for appellants.

(1) The Hannibal Meat Company, Limited, is an association created under and recognized by the laws of Pennsylvania; lacks none, but has all the attributes and characteristics of a corporation. It has: (a) A distinctive associate name, by which it may contract. (b) Perpetuity by transfer of its shares of capital. (c) Power to sue, and liability to be sued in the associate name. (d) Power to hold, convey and mortgage in the associate name, property of all kinds, and (e) the "right to adopt and use a common seal." This would seem to give the association corporate existence within the terms of the best definitions of a corporation. 2 Kent's Com. 278; Ang. & Ames on Corp. (10 Ed.) sec. 110; Field on Corp., sec. 1; *Dartmouth College v. Woodward*, 4 Wheat. 636; *Cutter v. Thomas*, 25 Vt. 73; 1 Wood's Collyer on Part., p. 5, note. (2) A joint stock association having like, but less powers than this, formed under the laws of England, which declared that the company should not be deemed a corporation, has been held to be a corporation by the Supreme Court of the United States. *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Oliver v. Ins. Co.*, 100 Mass. 531; *Lewis v. St. Charles Co.*, 5 Mo. App. 230; *Fargo v. Louisville, etc., Ry. Co.*, 20 Am. L. Reg. (N. S.) 529. (3) It seems that the members of limited partnership associations as to liability, are placed upon a similar footing with the members of perfect corporations, and are denominated *quasi* corporations. Ang. & Ames on Corp. (10 Ed.) secs. 42, 45; Field on Corp., sec. 4; 1 Bouvier's Inst. (Ed. 1872) sec. 186. (4) This action cannot be maintained, because it is not shown that the plaintiffs have exhausted their remedy against the Hannibal Meat Company, Limited, or shown such remedy to be ineffectual. *McClaren v. Franciscus*, 43 Mo. 452;

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Thompson on Stockholders, sec. 312; *Blair v. Gray*, 104 U. S. 769. (5) The law of the state under which the company was formed must control and govern the liability of the defendants. *King v. Sarria*, 69 N. Y. 24; Thompson on Stockholders, secs. 81, 83; 20 Am. Law Reg. (N. S.) 532. (6) The Hannibal Meat Company, Limited, could only be liable for negligence, neither it nor any member of the company could be held simply because the boiler exploded and injury followed. *Losee v. Buchanan*, 51 N. Y. 476. (7) The instructions, given by the court of its own motion, are contradictory of the third given for defendants, and submit issues not made by the pleadings. It cannot be determined whether the jury found on the ground of the incompetency of Collins or not. *Henschen v. O'Bannon*, 56 Mo. 283; *Wood v. Steamboat*, 19 Mo. 529; *Modisett v. McPike*, 74 Mo. 648.

T. H. Bacon for respondents.

(1) The Pennsylvania statutes of limited partnerships, in providing for the creation of certain elements of corporate capacity, do not provide for the creation of corporate individuality. The members of the company, when organized, formed in Pennsylvania what in many states is termed a voluntary association. Such bodies are not corporations, at home. *Leech v. Harris*, 2 Brewst. 571; *Taft v. Ward*, 106 Mass. 518. (2) By their answer defendants pleaded that the company was a joint stock one, under the laws of Pennsylvania, and they are estopped to claim it was a corporation. *Chapman v. Chapman*, 66 Mo. 299; *Russell v. Whitley*, 59 Mo. 196. (3) The alleged meat company was not organized until long after the accident. The members having, before a legal organization of the company, opened business in Missouri, are liable to strangers as general partners. *Richardson v. Pitts*, 71 Mo. 128; *Hurt v. Salisbury*, 55 Mo. 310. (4) The husband's claim was a separate cause

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of action (*Smith v. St. Joseph*, 55 Mo. 456), and the receipt from him in evidence restricted itself to his damages, and the court had the right to instruct it out. *Early v. Le Faivre*, 53 Mo. 470; *Wells v. Dryden*, 52 Mo. 319; *Cape Girardeau v. Harbison*, 58 Mo. 94. The husband was not a competent witness (*Wood v. Broadley*, 76 Mo. 23), and his alleged statements *in pais* were not evidence. Even if his testimony had been admissible it could not prove his agency (*Williams v. Williams*, 67 Mo. 661, p. 664), and much less could his hearsay statements be admissible without proof *aliunde* of his agency (*Sumner v. Saunders*, 51 Mo. 89), and by the statutes of 1875 nothing less than her written authority could enable her husband to appropriate her claim. Laws 1875, p. 61. He did not profess to collect her claim, and did not sign for her, or as her agent, but signed only in his own right. *Eysra v. Capelle*, 61 Mo. 578, p. 580. (5) The verdict was properly rendered for the "plaintiff." The plaintiff had no right to embrace in her suit any claim for the husband's damages (*Dailey v. Houston*, 58 Mo. 331), and her averments fully excluded such claim. The husband was but a nominal plaintiff. *Smith v. St. Joseph*, 55 Mo. 456. He was joined as husband, and not as co-plaintiff (*Boal v. Morgner*, 46 Mo. 48), because the statute in force at the time required him to be joined. W. S., 1872, sec. 8, p. 1001. (6) The court wrongfully (*O'Mara v. Hudson*, 38 N. Y. 445, p. 448, top), instructed the plaintiff out of court as to the alleged responsibility of the defendant for employing a fireman to act as engineer. (See *Harper v. Indianapolis*, 47 Mo. 567) and the court instructed the plaintiff out of court as to the alleged unsafe or dangerous condition of the boiler, so that any alleged error in these regards was swept away. Of the two instructions refused, the second was necessarily dispensed with in defendant's favor, and there was no evidence to support defendant's instruction hypothecat-

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ing organization in 1878. The opinion of Lippincott, as an expert, was properly admitted in evidence. *Eyerman v. Shehan*, 52 Mo. 221; *Maher v. Railroad*, 64 Mo. 276. Opinions formed from observation are often allowed, even in cases of non-expert witnesses. *Appleby v. Brock*, 76 Mo. 314; *Simmons v. Carrico*, 68 Mo. 416; *Kem v. St. Louis*, 40 Mo. 26.

RAY, J.—This was an action for damages for personal injuries to the plaintiff, Leonora Smith, begun in the Hannibal court of common pleas, April 10, 1879. The petition alleges: (1) The marital relation between the plaintiffs. (2) That the defendants, on the second day of February, 1878, entered into a co-partnership, under the firm name, style, and description of "The Hannibal Meat Company, Limited." (3) That in the prosecution of the partnership business, the defendants erected on certain premises in the city of Hannibal a second-hand steam boiler opposite plaintiff's residence. (4) That said steam boiler was greatly impaired and weakened by age, exposure to the elements, and previous service, and was suffered by defendants so to remain, and that such insufficiency of said boiler was known to defendants. (5) That defendants, in their use of said boiler, employed "an unskilful and incompetent agency, and knowingly placed said boiler under the control thereof." (6) That in the service of defendants the said boiler was subjected to unusual requirements involving unsafe and excessive strains and pressure, and was otherwise overtaxed. (7) The plaintiffs further say that by means of the premises, the defendants negligently caused and suffered said boiler to be and remain in an unreasonably unsafe and dangerous condition, and on August 23, 1878, the defendants being in charge, control, and operation of said boiler, by their agents and servants, did negligently manage and use said boiler, and by the negligence, unskilfulness, and misconduct of defendants, by their

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agent and servant, the said boiler was caused and suffered to explode, and thereby did explode with great violence, rending the same and the surrounding materials with great force, and projecting portions of the same with great force and violence at, against, and into the said abode of plaintiffs. Plaintiffs say that at the time of said explosion the said Leonora Smith, co-plaintiff herein, was sitting in the front door of her dwelling aforesaid, and by the missiles and materials impelled by said explosion, she was struck with great force and violence on the chest, and on each side of her abdomen, and on her thigh, and thereby was felled to the floor, the said blows greatly bruising and wounding her body, and permanently creating hernia on each side of her abdomen, and disabling her for life.

The answer: (1) Admits the relation of husband and wife between the plaintiffs, and that Leonora was injured by the explosion of the boiler, but denies that she was injured to the extent alleged in the petition. (2) The other allegations of the answer put in issue the remaining allegations of the petition. (3) And for another and further defence herein, defendants say that at the time of the injury "The Hannibal Meat Company, Limited," was, and now is, a joint stock company; that said joint stock company had been, prior thereto, to-wit: on the day of, 1878, duly, and in proper form of law, organized at the city of Philadelphia, in the state of Pennsylvania, in pursuance and by authority of the laws of said state, under the associated name of "The Hannibal Meat Company, Limited." That said company established its principal office and place of business in said city of Philadelphia, and thereafter, as it was by the laws of said state of Pennsylvania authorized to do, as defendants aver, on the day of, 1878, established at the city of Hannibal, in the state of Missouri, an office and place of business. That the business which said company was, by the laws

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of said state of Pennsylvania, authorized to do, and which it was doing at the time of said explosion and injury, was the buying and killing cattle, and canning the beef thereof, and shipping and selling said canned beef. That at said time the term of the existence of said company was unexpired. They say that the explosion of the boiler which caused the injury complained of by plaintiffs, occurred at said place of business of said company, in said city of Hannibal, while the same was in the use of said company in the carrying on of its said business, at its said place of business; and that said company, at the time the suit herein was brought, and summons against defendants herein was served, kept and maintained said place of business, at said city of Hannibal, and had in charge thereof, an officer and agent of said company. They say that said company was organized as aforesaid, under, and by virtue of the law of said state of Pennsylvania, approved June 2, 1874, and the law amendatory thereof, approved February 18, 1875. That by the provisions of said laws said company had, and has, the said company name, and under and by said name owns the property thereof and under and by said name was, and is, liable to be sued and have judgment rendered against it. And, further, that the members of said company are not individually liable to pay the debts or other liabilities of said company further than to the extent of their several unpaid subscriptions to the capital stock thereof, and then only after the property and effects of said company have been exhausted. Wherefore, they say that plaintiffs cannot maintain this action against these defendants. (4) Pleads facts which, it is alleged, amount to a compromise and settlement between the male plaintiff and The Hannibal Meat Company, Limited, and, also, between said Lenora and The Hannibal Meat Company, Limited.

The reply denied all the allegations of the answer.

At the trial of the cause, upon the issues thus pre-

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sented, the plaintiffs, to sustain said issues on their part, offered and read in evidence to the jury, the following "articles of association," with its acknowledgment and the filing entry, and certificate of the record thereof, viz. :

"THE HANNIBAL MEAT COMPANY.

[Limited.]

"In the matter of the Partnership Association of The Hannibal Meat Company, Limited: Whereas, a partnership association, limited, has been formed by the undersigned, in pursuance of the act of the assembly of the commonwealth of Pennsylvania, entitled 'an act authorizing the formation of partnership associations, in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances,' approved the second day of June, *Anno Domini*, 1874. Now, we, the undersigned, being the persons who have formed the said association, do hereby make this statement in writing, as required by the said act. The full names of the persons forming said partnership are as follows, viz. : William G. Warden, of the city of Philadelphia; Henry L. Davis, of the city of Philadelphia; Sidney T. Fuller, of the city of Philadelphia; John M. Hagy, of the city of Philadelphia; George H. Perkins, of the city of Philadelphia; Richard H. Wallace, of the city of Philadelphia; John H. Howland, of the city of Philadelphia; Henry Warden, of the city of Philadelphia; Charles Pratt, of the city of New York; John T. K. Hayward, of the city of Hannibal, Mo.

"The amount of capital of said association subscribed for by each of the said parties is as follows, viz. : William G. Warden, thirty thousand dollars; Henry L. Davis, five thousand dollars; Sidney T. Fuller, six thousand dollars; John M. Hagy, five thousand dollars; George H. Perkins, two thousand dollars; Richard H. Wallace, one thousand dollars; John H. Howland, one

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thousand dollars ; Henry Warden, two thousand five hundred dollars ; Charles Pratt, ten thousand dollars ; John T. K. Hayward, two thousand dollars. The total amount of the capital of the said association is sixty thousand dollars, and is payable one-half in cash on the execution hereof, and the other half within sixty days thereafter. The character of the business to be conducted by the association is that of general merchants and shippers, with the privilege of slaughtering cattle, sheep, hogs, etc. The name of the association is 'The Hannibal Meat Company, Limited.' The contemplated duration of said association is ten years from the date hereof. The location of said association is the city of Philadelphia. The names of the officers of the said association, who have been selected in conformity with the provisions of said act of assembly, are as follows, viz. : The managers are William G. Warden, Charles Pratt, Henry L. Davis, George H. Perkins, John M. Hagy. The chairman is William G. Warden. The treasurer is Henry L. Davis. The secretary is Henry L. Davis. In witness whereof we have hereunto set our hands, this second day of February, *Anno Domini*, one thousand, eight hundred and seventy-eight.

"W. G. WARDEN,
"CHAS. PRATT,
"by H. L. DAVIS, Att'y,
"HENRY L. DAVIS,
"J. MILTON HAGY.
"GEO. H. PERKINS,
"R. H. WALLACE,
"JNO. H. HOWLAND,
"HENRY WARDEN,
"J. T. K. HAYWARD,
"SIDNEY T. FULLER,

"Witness present:

"FRANKLIN NICHOLSON.

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"Before me, the subscriber, a notary public of the commonwealth of Pennsylvania, residing in the city of Philadelphia, personally appeared the above named William G. Warden, Henry L. Davis, Sidney T. Fuller, John M. Hagy, George H. Perkins, Richard H. Wallace, John H. Howland, Charles Pratt, and Henry Warden, and John T. K. Hayward, and declared the above statement to be true and correct; that they signed the same, and acknowledged the same to be their, and each of their, act and deed, and desired the same as such to be recorded according to law. Witness my hand and official seal this second day of February, A. D. 1878.

"FRANKLIN NICHOLSON, [SEAL.]

"Notary Public.

"Recorded, January 9, 1879, at 10:10 a. m.

"CITY AND COUNTY OF PHILADELPHIA, SS.

"I, Louis Wagner, recorder of deeds for said city and county, keeper of the records of deeds, in said city and county, do hereby certify that the above and foregoing is a true and correct copy of an instrument of writing, found of record in my office, in Corporation Partnership Limited Book, No. 1, Page 222, etc.

"Witness my hand and seal of office, this
"[SEAL] fourth day of April, A. D. 1879.

"LOUIS WAGNER,

"Recorder of Deeds."

The plaintiff next offered evidence showing that the defendants were members of the said partnership company, or association; and that plaintiff, Leonora Smith, was injured in consequence of the explosion of a steam boiler, then being used by said partnership company, at their place of business, in Hannibal, Marion county, Missouri. Plaintiff, then, by various witnesses, including said Leonora Smith, introduced evidence tending to show

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that at the time of the explosion the plaintiff, Leonora Smith, was sitting in a chair in the door of her house, across the street from and opposite to the head of the boiler; and, further, tending to prove that the explosion of the boiler threw water, pieces of coal, and pieces of brick, into the room where plaintiff Leonora was sitting, striking her in the abdomen, and overturning the chair in which she was sitting, felling her to the floor, and rendering her insensible; and, further, tending to prove that said missiles produced inguinal hernia on each side of the abdomen of said Leonora Smith, and made bruises upon her abdomen and legs; that she was under medical treatment, on account of said injuries, for eight or ten days, and was thereby confined to her house about two months. The evidence of plaintiff further tended to show the nature, extent, and duration of plaintiff's said injuries and suffering in consequence of the explosion of said steam boiler, as aforesaid.

Without going into particulars, it is sufficient, for the present, to say generally that the plaintiff then offered evidence of witnesses Lippincott and McElvaney, two experienced locomotive engineers, tending to show that the explosion of said steam boiler, and plaintiff's said subsequent injuries were due to and caused by the failure of the employes of said company, in the use and management of said boiler, to use a reasonable degree of care and caution to prevent said explosion and said consequent injuries, as aforesaid.

On the contrary, we may add, also, that the defendants, on their part, offered evidence on this point tending to show that there was no want of care or caution on the part of said employes in the use and management of said boiler. The defendants, in further support of their said answer, offered in evidence the statutes of Pennsylvania in relation to limited partnerships, the first and second sections of which alone need be given, and are as follows, to-wit:

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"1. When any three or more persons may desire to form a partnership association, for the purpose of conducting any lawful business or occupation, within the United States or elsewhere, whose principal office or place of business shall be established and maintained within this state, by subscribing and contributing capital thereto, which capital shall alone be liable for the debts of such association, it shall and may be lawful for such persons to sign and acknowledge before some officer competent to take the acknowledgment of deeds, a statement, in writing, in which shall be set forth the full names of such persons, and the amount of capital of said association subscribed for by each; the total amount of capital, and when and how to be paid; the character of the business to be conducted, and the location of the same; the name of the association, with the word 'limited' added thereto as part of the same; the contemplated duration of said association, which shall not in any case exceed twenty years, and the names of the officers of said association, selected in conformity with the provisions of this act. And any amendment of said statement shall be made only in like manner; which said statement and amendments shall be recorded in the office of the recorder of deeds of the proper county.

"2. The members of any such partnership association shall not be liable under any judgment, decree, or order which shall be obtained against such association, or for any debt or engagement of such company, further or otherwise than is herein provided; that is to say, if any execution, sequestration, or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient thereof, whereon to levy or enforce such execution, sequestration, or other process, then such execution, sequestration, or other process may be issued against any of the members to the extent of the portions of their subscriptions, respectively,

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in the capital of the association, not then paid up : *provided, always*, that no such execution shall issue against any member, except upon an order of court, or of a judge of the court in which the action, suit, or other proceeding shall have been brought or instituted ; and the said court or judge may compel the production of the books of the association, showing the names of the members thereof, and the amount of capital remaining to be paid upon their respective subscriptions, and from them, or other sources of information, ascertain the truth in regard thereto, and may order execution to issue accordingly ; and the said association shall be and it is hereby required to keep a subscription list book for that purpose, and the same shall be open to inspection by the creditors and members of the association at all reasonable times."

The defendants also offered, and read in evidence, the following agreement between Henry Smith, the husband of the plaintiff, Leonora, and the defendants, to-wit:

"HANNIBAL, Mo., October 9, 1878.

"I have this day agreed with Mr. Smith, as a matter of good neighborhood, and not acknowledging any legal obligation on the part of the Meat Company, to pay him the actual damage to his furniture, as ascertained by a reference, who examined it after the damage. I will also pay the doctor's bill incurred by him for his wife up to the present time, and pay for a good truss for his wife, and this is to be in full for all claims for damages growing out of the boiler explosion at the Meat Company's works some two months ago, whether the same be legal or otherwise, to Mr. Smith, his property, or members of his family.

"(Signed) "J. T. K. HAYWARD,
for Hannibal Meat Co., Limited.
"HENRY SMITH."

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This agreement is endorsed by Henry Smith, as follows: "Received on account of the within fifty dollars. Henry Smith." The defendants further proved the payment of two doctors' bills, one for thirty dollars, and the other for five dollars, and a readiness to pay the bill for the truss whenever presented. The defendants also offered evidence tending to show that the hernia with which plaintiff Leonora Smith is afflicted, was not produced by said explosion, and was of anterior date and chronic in its character. There was other evidence in the cause not deemed material to the proper disposition of the case, and need not be further noticed. At the conclusion of the testimony the court, of its own motion, instructed the jury as follows:

"1. It is admitted by the pleadings that plaintiff, Leonora Smith, was injured in consequence of the explosion of a steam boiler then used by the Hannibal Meat Company at their place of business, but the defendants deny that such injury was to the extent claimed by plaintiffs."

"2. The articles of association, read in evidence, are sufficient to show *prima facie* that the defendants were, at the time the injury occurred, members of the Hannibal Meat Company."

"3. If the jury find, from the evidence, that the injury to the person of the plaintiff Leonora was caused by the want of a reasonable degree of skill in the employe of said company in charge of the boiler at the time of the explosion, or if the jury find that such injury was caused by the failure of said employe to use a reasonable degree of care and caution to prevent the explosion, the defendants, as members of said Hannibal Meat Company, Limited, are liable for the actual pecuniary damage resulting from said injury to the person of said Leonora, and the verdict should be for the plaintiffs."

"4. It is for the jury to determine, upon all the facts and circumstances in evidence, whether the explo-

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sion of the boiler was, or was not, caused by the want of a reasonable degree of skill in the employe of said company, or whether said explosion was, or was not, caused by the failure of said employe in charge of said boiler to use a reasonable degree of care and caution to prevent said explosion."

"5. The agreement read in evidence, signed by the plaintiff Henry Smith, and the payments made to him and to the physicians under that agreement, do not constitute a defence to this action."

"6. Unless the jury find, from the evidence, that the explosion of the boiler resulted from the want of a reasonable degree of skill in the employe of the company having the charge and management of the boiler at the time of the explosion, or that the explosion was caused by the failure of said employe to use a reasonable degree of care and caution in the management of said boiler, they should find a verdict for the defendants."

"7. If the jury find the issue for the plaintiffs, the measure of her damage is the actual pecuniary loss or damage sustained by her, and in estimating such actual damage, they may take into consideration every fact and circumstance proved in evidence tending to show the nature and extent of the injury to her person caused by the explosion."

To the giving of which instructions and each of them defendants at the time excepted.

At the instance of the defendants, the court also gave the following instructions:

"3. The court instructs the jury that there is no evidence before the jury tending to prove that the man Collins, spoken of by witnesses as being in charge of the boiler at the time of its explosion, was not possessed of reasonable knowledge or skill in the management of steam boilers."

"4. There is no evidence tending to show that the said boiler, prior to and at the time of said explosion,

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was, by reason of defects thereof, in an unsafe or dangerous condition."

The court refused the following instructions, asked by the defendants, to which they excepted: "1. If the defendants herein, with others, on the ——— day of ———, 1878, organized an association under the name of The Hannibal Meat Company, Limited, in the city of Philadelphia, state of Pennsylvania, under and in pursuance of the laws of Pennsylvania read in evidence by defendants, and if said association thereafter established a place of business and office at the city of Hannibal, in Marion county, Missouri, and if, at the time of the explosion of the boiler which caused the injury complained of by plaintiffs, said boiler belonged to and was being used by said company in its business, then and in that case plaintiffs cannot recover in this action against these defendants."

"2. Even if the jury should believe from the evidence in the cause that the person in charge of the boiler at the time of the explosion was not a person skilled in the management of steam boilers, and that said explosion resulted from such unskillfulness, nevertheless, if the jury shall further find from the evidence that defendants in the selection and employment of such person, exercised proper and reasonable care and prudence, then and in that case defendants are not responsible for any damage to plaintiff resulting from the fact that said employe did not possess reasonable skill in said business."

The plaintiff had a verdict for fifteen hundred dollars, and there was judgment accordingly, from which after an unsuccessful motion for new trial, and in arrest, defendants have appealed to this court. It appears from this record that the only questions before us for review grew out of the action of the court in giving and refusing instructions.

It is insisted for appellants that the court erred in

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the third and fifth instructions given on its own motion, also in refusing the first instruction asked by the defendant. These positions are denied by respondent. The theory or contention of the appellants is that the "Hannibal Meat Company, Limited," is a corporation or joint stock company, duly organized in the state of Pennsylvania, under and by virtue of a statute of that state, having its chief office in said state, but doing business as such by virtue of said Pennsylvania law, at Hannibal, in Marion county, Missouri, when and where the injury complained of occurred, that said corporation, as such, is alone liable and suable for said injury, and that these defendants as members of said company, are not liable to be sued or responsible therefor, except to the extent and in the manner as therein provided; and, further, that said corporation, or joint stock company being organized under the laws of a sister state, for purposes and with limitations consistent with the policy of our laws, will be recognized and protected by the courts of this state with the rights and exemptions incident thereto.

The respondent, however, insists that even if appellant's legal propositions were admitted to be correct, still there is no evidence in this record that said corporation or joint stock company, in point of fact, was ever organized in conformity to the provisions of said Pennsylvania statutes, or that said statute is consistent with the policy of our laws on the same or kindred subjects.

What are the facts, as shown by the record? It appears that the Pennsylvania statute in question, under which the defendants claim exemptions and protection provides that when three or more persons desire to form a co-partnership association, for the purpose of conducting any lawful business or occupation within the United States, or elsewhere, whose principal office or place of business shall be established and maintained within said state, by subscribing and contributing capital thereto,

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which capital shall alone be liable for the debts of such association, it shall and may be lawful for such persons to sign and acknowledge before some officer competent to take the acknowledgment of deeds, a "statement in writing," in which shall be set forth, among other things, "the character of the business to be conducted and the location of the same," * * * "which said statement, etc., shall be recorded in the office of the recorder of deeds of the proper county." The record does show that said articles of association were filed and recorded in the office of the recorder of deeds, in and for the city and county of Philadelphia, in said state, on January 9, 1879, but this was five months after the injury in question was inflicted. A full compliance with that law, both as to the statements to be made in the articles of association and the record thereof was essential, and a pre-requisite to the formation of the limited partnership or association in that state, and if the parties proceeded to do business before thus having complied with the law, they did so as general partners. Until such record was made in the state of Pennsylvania, they were general partners even in that state, and as a necessary result they must be held bound and liable as such in this state. The statutes of Pennsylvania, as such, can have no extra-territorial force or operation in this state, but rights which had accrued in that state under such statutes might be enforced here.

There was evidence tending to show that some injury was also occasioned by said explosion to the furniture and household effects of Mr. Smith, the husband, besides that done to the person of the wife, for which this action was brought. For these several injuries, two distinct causes of action arose; one to the husband for the injury to his furniture, etc., and the other to the wife for the injuries to her person. The receipt of the husband, offered and read in evidence, was no bar to the cause of action, thus accruing to the wife, and for which this suit

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was brought. By its own terms, fairly construed, the receipt of the husband is limited to the payment of the actual damages to his furniture, to the payment of the doctors' bills incurred by him by reason thereof, up to that date, and in further payment of a truss to be purchased for the wife. If there is anything in the latter clause of the receipt, indicating that the same is to be in full for all damages done to the person of the wife, then the same to that extent is without consideration, and besides that, there is no evidence that the husband had any authority from the wife to settle or dispose of her right of action, growing out of the injury so done to her person. See section 3296 of the revision of 1879, p. 560; *Eystra v. Capelle*, 61 Mo. 578; *Smith v. City of St. Joseph*, 55 Mo. 456; *Rogers v. Smith*, 17 Ind. 323; *Long v. Morrison*, 14 Ind. 595; 13 Ind. 366; 15 Ind. 73; 53 Mo. 470; 52 Mo. 319; 73 Mo. 28; 65 Mo. 202, 205.

It follows, therefore, that there was no error in the giving or refusing of said instructions. Those given presented the whole case fairly to the jury and their verdict is conclusive as to all matters of fact, about which the testimony was conflicting and contradictory.

Some exceptions were taken at the trial to the admission of evidence, but they are not insisted on here and were not well taken. Finding no error in the record, the judgment of the trial court, for the reasons stated, is affirmed. All concur.

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THE ST. JOSEPH BOARD OF PUBLIC SCHOOLS V. GAYLORD
et al., Appellants.

1. **General Assembly.** One general assembly cannot prescribe the manner or the language by which a subsequent general assembly shall amend, alter or repeal a law passed by the former.
2. **St. Joseph Board of Public Schools: BONDS: AUTHORITY TO ISSUE.** The St. Joseph board of public schools had authority, by virtue of General Statutes, 1865, chapter 47, section 11, to issue, during the years 1868 and 1871, its bonds to raise money to build school houses; and, also, to issue its renewal refunding bonds, under Revised Statutes, 1879, section 7034.

Appeal from Buchanan Circuit Court.—HON. JOSEPH
P. GRUBB, Judge.

AFFIRMED.

Hough, Overall & Judson for appellants.

(1) Section 7034, Revised Statutes, authorized respondent to issue the renewal funding bonds in question. The law of 1877 can be enforced without the necessity of employing a repeal of section 23 of respondent's charter. Besides, laws are presumed to be passed with deliberation and with full knowledge of all existing ones, and appellants insist that it is reasonable to suppose that if the general assembly had intended to alter respondent's charter the courts would not have been left to conjecture in the face of a positive prohibition against the construction of amendment by implication. (2) It is evident from the title of the act of 1877, and from its provisions, that it was intended to apply to those corporations only known as "boards of education." There are known to the laws of Missouri, as parts of the public school system,

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corporations that may be divided into four classes, viz. : (a) By section 7, page 129, of Laws of Missouri, 1870, the governing bodies of the public schools of any city, town or village, that elects to place itself under the act of March 21, 1870, is declared to be "a body corporate by the name of the board of education of said city, town or village." (b) There are "boards of education" of other cities, towns and villages governed by special laws, and which by section 1, page 127, Laws of Missouri, 1870, are exempt from the law approved March 21, 1870. (c) By section 19, page 144, Laws of Missouri, act approved March 19, 1870, the governing body of the public schools in each congressional township is declared to be "a body politic and corporate in law, and shall be known by and under the name and title of township board of education of township No. —, range No. —, county of —, and state of Missouri." At different times the general assemblies of Missouri have given charters to the governing bodies of the public schools of certain cities, as, for instance, to respondent, the "St. Joseph Board of Public Schools," and the "Board of President and Directors of the St. Louis Public Schools." The act of 1877 mentions only one of these classes as having conferred upon it the power of issuing renewal funding bonds. What right has a court to suppose that the legislature intended to grant to each six miles square of farming land in Missouri, surveyed into a congressional township, the right to flood the world with its refunding bonds because it has said that a certain corporation known by a designated name shall have that power? The judgment of the court below should have been for defendant.

Crosby, Rusk & Craig for respondent.

(1) It was not competent for that legislature to bind a subsequent one to any particular method of altering

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or repealing a public act, much less to incorporate within it any inhibitory provision which could stand against and overcome the clearly expressed intention of a subsequent legislature. (2) There would seem to be little doubt that it was the legislative intent that section 11, of chapter 47, of the General Statutes, authorizing the issue of bonds, should apply to, and, if need were, to amend the St. Joseph charter, and as little doubt that if such were the intent to be drawn from the whole chapter, such was the effect of the section. (3) It was not the intention of the legislature by the act of 1867 to restrict the powers of school districts within any narrower limits than those imposed by the act amended. The act of 1867 was intended to apply to all boards of education, whether organized under the provisions of chapter 47, or under any other general or special law, and if such was the intention, respondent had authority under the general law, if not by virtue of its charter, to issue the bonds it issued in 1868.

Thomas F. Ryan for the taxpayers.

(1) The charter of the St. Joseph board of public schools was approved January 4, 1860, and amendments thereto approved March 13, 1866, and March 20, 1872. Neither in the charter nor amendments to the same can there be found any express power to issue bonds for the building of school houses or for any other purpose. If such power exists, it must be an implied power granted to said board of education. Corporations have no such power. "Corporations have not the implied power to borrow money and issue commercial and negotiable instruments." Dillon on Municipal Corporations (3 Ed.) sec. 507; 15 Wall. 566; 16 Wall. 6; 19 Wall. 478; and see section 106 (3 Ed.) Dillon, and authorities cited in notes. "Corporations have only such powers as are specially given by

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their charters or necessary to carry into effect some specified power." 9 Mo. 507; 10 Mo. 559; 43 Mo. 353. "They must act strictly within the power conferred on them." 36 Mo. 294. "The distinction between a natural person and a corporation is that while the former may make any contract not prohibited by law, or against public policy, the latter can exercise only such powers as are expressly conferred on them by their charter." 37 Mo. 399. That the implied power to issue bonds was not intended to be granted to plaintiff by its act of incorporation is evident from the provisions of section 14 of said act. (2) The power to issue the bonds was not given by the general laws of the state.

BLACK, J.—The pleadings in this case admit that plaintiff, The St. Joseph Board of Public Schools, in 1868 and 1871, issued a large amount of bonds to raise money to build school houses. These bonds were sold and the interest thereon paid up to October, 1880. Judgments have been rendered on subsequent maturing coupons by the circuit court of the United States, and writs of mandamus have been issued directing the levy and collection of the bonds to pay such judgments. To pay these matured and maturing bonds, and acting by authority of section 7034, Revised Statutes, 1879, the plaintiff, in March, 1885, directed the issue of \$130,000 of renewal funding bonds. These funding bonds were issued of date March 2, 1885, and were sold to the defendants for \$124,713, to be delivered and paid for at a specified time. The contract provides that it shall not be binding on defendants unless the bonds were issued in conformity to and by authority of law, so as to be the valid obligation of plaintiff. Upon tender of the bonds at the proper time, the defendants refused to accept and pay for the same, and hence this suit, which resulted in a judgment for plaintiff, from which the defendants appealed.

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The defendants say, in their answer, section 7034 only applies to those corporations designated in the laws of this state as "boards of education," and that said section has no application to plaintiff, because the twenty-third section of plaintiff's charter is not in express terms designated. Interested parties, though not made such on the record, have filed briefs in which they dispute the validity of the original bonds. This question will be first considered.

1. By the act of January 4, 1860 (Acts of 1859, p. 111), and the amendatory act of March 13, 1866 (Acts of 1865-6, page 209), the residents of school district number one, in school township eight, Buchanan county, as the limits were then, or might thereafter be established, were made a body corporate by the name of the "St. Joseph Board of Public Schools," with its powers invested in and duties devolved upon a president and directors. These acts give them power to make and certify annually to the county court the amount of money necessary to be raised for the purpose of building and repairing school houses, paying teachers, etc., which the county court is required to levy and collect with other taxes; the amount, however, not to exceed one-half of one per centum in any one year. No express authority is given plaintiff, by either of these acts, to borrow or issue bonds for any purpose. The general statutes of the state were, doubtless, relied upon for authority so to do.

The twenty-second section of the special law of 1860 refers to and makes applicable to plaintiff, so far as the provisions are consistent, the general act relating to school corporations in cities, towns and villages, approved December 12, 1855. The law of 1860 (section 23) first reserves to the general assembly the power to change or repeal the same, and then provides: "But no law hereafter passed shall be construed as changing, altering

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or repealing the whole, or any part of this act, unless this act be expressly mentioned in such law."

Chapter 47 of the General Statutes of 1865, provides a method by which any city or town, with territory attached for school purposes, may be organized under the corporate name of the "board of education" of such city or town, with powers not conferred upon school districts in general. The first section, among other things, says that the provision of that chapter shall not apply to "any city, town or village, or any part thereof, which is now governed as to schools by any special law." The eleventh section is as follows: "The board of education of any city, town or village elected in pursuance of this act, as also the board of education, or school directors of any city, town or village already organized under any special act, to enable them to borrow money for building school houses, are hereby authorized to issue bonds, running," etc.

The general assembly of 1859 could not determine how or by what language alone the special law of 1860 should be amended, altered, or repealed. The assertion in that respect was not binding upon any subsequent session of that body. The latter might amend, alter, or repeal the law by the use of any language that was pertinent and thought to be best. The will of any subsequent general assembly, in that respect, was supreme. Nor do we have any doubt but that section eleven of the general law of 1865 was intended to and does apply to plaintiff. It is true, if the plaintiff and like organizations are intended, it is because of the expression "also the board of education or school directors of any city * * * already organized, under any special act." It is true that the charter name of plaintiff was, in part, "board of public schools," but we do not regard this difference as material. It must be borne in mind that many cities and towns in this state were organized with and without attached territory for school purposes under

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special acts. They were, so far as they had corporate powers, public corporations, and at all times subject to the will of the legislature. Though organized in whole or in part under special acts, they were a part of the system of public schools of this state, as much so as if acting wholly under general laws.

Section 14, of chapter 47, also provides: "The provisions of sections seven, eight, nine, and ten of this chapter shall also apply to the *board of education or directors* of any city, town, or village, already organized under any law for school purposes, except the city of St. Louis." Why make this exception, unless the general assembly believed the language previously used therein would apply to the "board of presidents and directors of the St. Louis public schools?" The description of the corporations from which the exception is made is almost the same as that used in section eleven.

These considerations all lead to the conclusion that section eleven was intended to and did apply to plaintiff, and hence gave it authority to issue the bonds at that date. By the act of March 13, 1867 (Acts of 1867, p. 163), this section was made to read as follows:

"The board of education elected in pursuance of this act, as well as the board of education or school directors of any city, town, village or district already organized under any law authorizing them to borrow money for building school houses, are hereby authorized to issue bonds," etc. While there is some change in the language of this section, we think it still applicable to all those school corporations which at that date had authority to issue bonds to build school houses, and we have seen the plaintiff did then have the power. In one sense the plaintiff was organized under the special act of 1860, but it was certainly acting by authority also of the act of 1866, and portions of the general law, and in this sense it was organized under all these laws, at the date of this last act, and it is in this sense the language

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was used. It was not designed to take away powers then existing in regard to issuing bonds.

2. If section eleven, of chapter forty-seven, General Statutes, 1865, applied to plaintiff corporation, then it is very evident that section 7034, Revised Statutes, 1879, also applies. Any further consideration of this branch of the case is unnecessary.

The judgment of the circuit court is affirmed. All concur.

BRONSON *et al.* v. WANZER *et al.*, Appellants.

1. **Equitable Action : PRACTICE : JURY.** A suit to subject land to the enforcement of a vendor's lien being an equitable one is properly triable by the court and a jury cannot be demanded therein as a matter of right.
2. ——— : ——— : ———. The court, however, in such suit, may, in its discretion, take the opinion of the jury upon a specific question of fact by an issue made up for the purpose, but it is not bound by the finding of the jury and may adopt or reject the same as it may deem proper.
3. **Notice.** One who claims title through a deed which recites that the land is subject to an incumbrance will be held to have been put on inquiry as to the nature and amount of such incumbrance when he purchased.
4. **Vendor's Lien.** One who buys land, subject to a vendor's lien, with notice of the same, takes it subject to such lien.

Appeal from Macon Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

Dysart & Mitchell and *C. P. Hess* for appellants.

(1) The court erred in denying a jury ; the issue was

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one at law. *Henderson v. Dickey*, 50 Mo. 161; *Crowe v. Peters*, 63 Mo. 429. So the court erred in subsequently withdrawing the issues and discharging the jury. (2) The court erred as to defendant, Wells, in receiving the testimony of D. A. Patton. It was a conversation of Wanzer's in the absence of Wells, long after he had purchased the property, and the court received it as against both the defendants without qualification; and Bronson was permitted to testify to the same conversation. (3) The court should have received the testimony of the offer by the defendants to return and re-deed the property to the plaintiffs, if they would return and pay back the amount paid to them by Wanzer. (4) The court erred in finding against Wells at all. Taking a deed even expressed on its face to be subject to a mortgage is not an undertaking to pay the mortgage. He is only liable to pay a prior mortgage when the deed so stipulates and then it is a simple debt or undertaking to be enforced *in assumpsit* by the mortgagee. *Duncan v. Baker*, 72 Mo. 469; *Helm v. Vogel*, 69 Mo. 529; *Cox v. Esteb*, 68 Mo. 110. (5) The court erred in permitting Macon county to interplead and claim the judgment to be rendered after the evidence was closed. Besides, the decree was not responsive to the allegations of the petition. *Crowe v. Peters*, 63 Mo. 429; *Cox v. Esteb*, 68 Mo. 110; *Clements v. Yates*, 69 Mo. 625. (6) The court erred in declaring a vendor's lien in favor of Bronson. *Emison v. Whittlesey*, 55 Mo. 254.

Berry & Thompson for respondents.

(1) The decree of the lower court should be affirmed. It was understood by the Bronsons and by Wanzer at the time that the land was covered by the county's mortgage and hence the insertion in Wanzer's deed "subject to any incumbrance of the county of Macon." Wanzer

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under the facts still owes Mrs. Bronson the remainder of the purchase money. (2) Wells, when he bought, had such knowledge of the facts as to put a prudent man on inquiry as to the incumbrance on the land. (3) The court properly treated the petition as a bill in equity to enforce a vendor's lien for purchase money. (4) Mrs. Bronson was not bound by the agreement made by her husband with Wanzer, by which the latter was to pay her note to the county. She can ratify such acts of her husband as her agent as she chooses. *Hall v. Callahan*, 66 Mo. 316.

RAY, J.—In 1876 Martha H. Bronson, wife of Samuel P. Bronson, owned in her own right the northwest quarter of the southeast quarter of section twenty-five, township fifty-seven, of range fourteen, in Macon county, Missouri. On the fifth day of April, 1876, Mrs. Bronson borrowed five hundred dollars of Macon county, from the school fund, and she and her husband then executed and delivered their note therefor to Macon county, and at the same time executed and delivered a deed of trust intending thereby to convey said land in trust to secure said note, but by mistake the land was described in the deed of trust as the northeast instead of the northwest quarter. In November, 1876, the Bronsons sold and conveyed the land by correct description to appellant, Wanzer, for a consideration of eight hundred and fifty dollars.

The deed to Wanzer was a general warranty in form, and specially undertook to warrant and defend the title against all claims and demands, "except taxes due and any incumbrance to the county of Macon." This deed was duly acknowledged and recorded the same day. Afterwards, on the tenth day of April, 1878, defendant, Wanzer, sold and conveyed said land to defendant, George Wells, by warranty deed duly recorded, for the consideration of four hundred dollars. This suit is to

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recover of said Wanzer five hundred dollars and interest, balance of the purchase money alleged to be due and unpaid, upon the sale of the premises by plaintiffs to him, and to enforce the vendor's lien against the property for the balance of the purchase money found to be due.

The petition sets out the foregoing sales, alleges that prior thereto, on the fifth day of April, 1876, the plaintiffs borrowed of Macon county a sum of money, and to secure the payment thereof gave a deed of trust upon what they supposed to be the same property and real estate now in controversy, but that by mistake the numbers and description inserted in said deed of trust were the northeast of the southeast of twenty-two, fifty-seven, fourteen, instead of the northwest of the southeast of twenty-two, fifty-seven, fourteen, the latter being the property intended to be conveyed by the said deed of trust; that at the time of the sale to Wanzer, plaintiffs had not discovered the error, but both believed the county debt to be a lien on the property, and so informed Wanzer, and that the county's incumbrance thereon was mentioned in the deed so delivered to him; that at the time of the sale to Wanzer there was unpaid and due of the Macon county debt about five hundred dollars with some interest; that Wanzer paid plaintiffs on said land two hundred and eighty dollars, and assumed and promised to pay off the county debt, as the balance of the purchase money; that Wanzer's sale and conveyance to Wells was only pretended, and made to cheat and defraud plaintiffs, and that Wells accepted his deed from Wanzer with full knowledge of all the facts; that neither Wanzer nor Wells had paid the five hundred dollars due the county, nor any part thereof, but the same remained unpaid and that the plaintiffs were still liable therefor to Macon county.

The defendants then answered separately, putting in issue all allegations of the petition, except the rela-

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tionship of plaintiffs and the several conveyances to the defendants.

At the trial the defendants claimed that this was an action at law for the recovery of money, and demanded a jury. But the court held the case to be one in equity and refused a jury except upon issues. It ordered a jury for the purpose of trying some four several issues, all of which were, however, withdrawn from the jury at the close of the evidence, except issue numbered four, as to whether or not the defendant Wells, at the time of his purchase of the land in controversy from the defendant Wanzer, had notice that said defendant Wanzer was owing any part of the purchase money on said land, which issue number four was submitted. After having been instructed by the court, on its own motion, upon said issue, the jury retired to consider of their verdict and afterwards returned into court and reported that they had failed to agree, and the court thereupon discharged the jury and found the issue for the plaintiffs. After the finding upon the issue, but before final judgment was rendered, Macon county filed her interplea by leave of court. The interplea was filed by prosecuting attorney, Ben. E. Guthrie, one of the attorneys of the plaintiffs, and states that the claim of Mrs. Bronson, sought to be enforced, is her sole and separate property; that at the time of the execution of the notes to Macon county said Martha H. Bronson was seized and possessed of certain personal property of great value as her sole and separate property; that the pleadings in this cause admit and the evidence shows that she is equitably indebted to Macon county in the sum of five hundred and one dollars; that the sole and separate property of said plaintiff is liable for the payment of such debt; that the pleadings admit and the evidence shows that said plaintiff fully intended and specially stipulated that the proceeds of this claim against defendant should be applied to the payment of

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the county debt. That said county had an equitable right to have said claim appropriated to the payment of her debt against said plaintiff. The county prays, therefore, that the decree in this cause in favor of plaintiffs be so made and rendered that the proceeds of the judgment be applied to the payment of the county debt due from the Bronsons.

In the progress of the trial the defendants duly excepted to the court's action in refusing a jury and to the withdrawal of said issue number four when submitted, and to the court's action in discharging the jury and its said finding for the plaintiffs thereon, and to its action in admitting the county to interplead in said cause. Portions of the evidence deemed material and defendants' exception to the admission of certain portions thereof will be hereafter noticed.

The decree rendered by the court recites the facts stated in the petition and finds them to be true; finds fraud and collusion between Wells and Wanzer; finds that the real estate mortgaged to the county was the property of Mrs. Bronson; that the property was worth nine hundred dollars when sold to Wells; that the county's debt against the Bronsons was \$818.06; that Wanzer had assumed to pay the county debt as part of the consideration of his purchase, but had failed to do so, and was indebted to the plaintiff, Martha Bronson, in the sum of \$818.06; that Macon county by consent of plaintiffs had interpleaded and claimed the proceeds of the suit. Judgment is rendered against Wanzer in favor of Mrs. Bronson for \$818.06, and it is decreed that the land be charged with a vendor's lien, and be sold by the sheriff on special execution; and that the proceeds be brought into court and applied to the payment of the costs of this suit and the county's debt of \$818.06, the balance, if any, to be paid to Wells. After unsuccessful motions for new trial and in arrest the defendants bring the case to this court by appeal.

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A careful examination of this entire record fails to disclose any error in the action of the trial court, of which these defendants, or either of them, can justly complain. The court properly treated the case as in the nature of an equitable proceeding to enforce the plaintiffs' lien, as vendors of real estate, for balance of the purchase money remaining due and unpaid, and subjected the same in the hands of defendant Wells, with notice thereof, to sale for its payment. The case, therefore, was one properly triable by the court, and in which the defendants could not, as a matter of right, demand a jury. In such cases, however, the court, in its discretion, "may take the opinion of a jury upon any specific question of fact involved therein, by an issue made up therein for that purpose." See sections 3600 and 3601 of the Revised Statutes of 1879. It has frequently been held by this court, that while the circuit court may, in its discretion, thus take the opinion of a jury, still it is not bound thereby and may adopt or reject the same, according to its best judgment, upon consideration of the whole case, and all the evidence therein. *Snell v. Harrison*, 83 Mo. 651, and authorities there cited.

The exceptions to the rulings of the court, as to admission of evidence, with the qualification and limitations thereto attached by the court, were not well taken. The jury were properly told that while the evidence offered and complained of was not competent as against the absent party, yet, that it was admissible against the party in whose presence the conversation or transaction occurred. There was no pretense but that there was a balance of the purchase money from Wanzer to Mrs. Bronson due and unpaid, and the only real controversy was whether the defendant Wells, had notice thereof when he purchased of Wanzer. On this point, there was much testimony on both sides, and great conflict and contradiction in much of it. Besides that, the recital in the deed from Bronson to Wanzer, under which

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defendant Wells necessarily claimed, was such as to put him on inquiry as to the extent and nature of "any incumbrance" that Macon county might have thereon.

If the records, when searched, failed to disclose "any incumbrance," or what it was, yet application to the county officials having in charge such matters, if convenient and acceptable, might and probably could have informed Wells of the existence of the incumbrance to the county referred to in said deed to his vendor Wanzer, as well as its precise nature and extent. This inquiry, it seems, he failed to make. The source of this information, it appears, was at hand, and easily accessible to Wells, if he really wanted to find out, and his failure so to do, in connection with other evidence in the case, might well justify the inference that he either purposely avoided such inquiry, or otherwise had knowledge thereof. To say the least of it, there was in the record abundant evidence to justify the finding of the trial court, which had all the witnesses before it, and a better opportunity to judge of its weight and value than we can have by simply reading the record of what occurred before the trial court. Under such circumstances we are accustomed, even in equity cases, to defer somewhat to the findings and judgment of the trial court, who thus has all the parties before it. *Chapman v. McIlwraith*, 77 Mo. 38.

As to the interplea of Macon county, under the circumstances shown in the pleadings and the evidence in the cause, we see nothing in the action of the court in that regard of which the defendants can justly complain.

If the finding of the court was right and proper, of which we have no question, we cannot see what concern it is to the defendants who got the proceeds of the sale of the land so ordered. The plaintiffs Bronson are the only parties affected thereby, or who might have cause to object thereto; but they did not appeal from said order or judgment, and as far as the record shows, acquiesced

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therein and consented thereto. Under this state of the record, we are not called on to consider what defence, if any, Mrs. Bronson might have made to such interplea, if she had sought to do so. It is clear from the record that the plaintiff Bronson had a right, as vendor, to subject the land to sale, to pay the balance of the unpaid purchase money, and we see no merit in the offer of defendant Wells to surrender the land to plaintiffs, coupled with the condition that plaintiffs should first refund that part of the purchase money already paid. We find no error in the record, and the judgment of the trial court is affirmed. All concur.

FERRENBACH *et al.*, Appellants, v. TURNER *et al.*

1. **St. Louis City : PUBLIC STREETS : WELLS.** The city of St. Louis has the right to abolish wells situated within the limits of its public streets.
2. ——— : **WELLS : LICENSE, REVOCATION OF.** The passage of an ordinance by the city, directing its street commissioner to fill up said wells, operates as a revocation of any license, express or implied, to construct the wells in the streets.
3. ——— : ———. The city can abolish said wells at the public expense, and the persons who construct them are not entitled to compensation for their loss.

Appeal from St. Louis City Circuit Court.—HON.
DANIEL DILLON, Judge.

AFFIRMED.

F. T. Ledergerber and Louis Gottschalk for appellants.

- (1) Taxpayers have the right to bring this action

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and sue out an injunction. *Mathis v. Inhabitants*, 62 Mo. 504; *Newmeier v. M. & M. R. R.*, 52 Mo. 81; *Roach v. St. Louis Public Schools*, 77 Mo. 485. (2) The city of St. Louis has no right to close up wells, without due process of law. Const. of Mo., secs. 21, 22, 30, art. 2. There is a special property and franchise in wells, protected by the constitution. The adjoining property owners own to the middle of the street subject to the easement. *Everett v. City*, 46 Iowa, 67; *Clark v. Darro*, 34 Mich. 86; *River Rendering Co. v. Behr*, 77 Mo. 91; *Lowry v. Rainwater*, 70 Mo. 152. (3) And the city cannot fill up wells, at its own expense, or at the expense of the general taxpayers, but must, in the first instance, order the owners to fill them up, and only in case of their neglect so to do, can the city do it, and for the costs issue a special tax bill. Charter of City, 2 R. S. Mo., p. 1587, art. 3, clause 9; art. 6, p. 1608, secs. 2, 3, 8, 12, 14, 19; art. 12, p. 1619, secs. 3, 6, 7, 8. And this applies even to nuisances. Art. 12.

Leverett Bell for respondents.

(1) The powers granted the city in its charter (2 R. S., p. 1585, art. 3, sec. 26), are amply sufficient to support section two of ordinance 13,272, in question. (2) The licenses to have the wells in the street, claimed by appellants, if granted, were revocable by the city at will, and without notice, and ordinance 13,272 is a revocation. *Desloge v. Pearce*, 38 Mo. 599; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746. (3) No property right can exist in a well in a public street. (4) Injunction is not the proper remedy in a case of this character. The alleged damages are illusive. Measures intended to promote the public health, and which are, in their nature, governmental, and within the police power of the state, ought not to be restrained by injunction.

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BLACK, J.—This was a suit to enjoin the defendants from filling up wells in the streets of St. Louis. A temporary injunction was denied, and the petition dismissed.

The plaintiffs are resident taxpayers, and commenced the suit for themselves, and all other persons similarly situated. They allege that some of the plaintiffs, and many other persons, owners of different parcels of real estate, with the consent of the city, express or implied, dug wells on their respective parcels of property, and in the sidewalks, and furnished the same with pumps, etc. That some of the wells have been in use for twenty-five years, are permanent structures, maintained at great expense by the owners, and furnish healthy and wholesome water. That the city of St. Louis passed an ordinance, the second section of which is as follows :

“Section 2. All wells, located in any of the streets, avenues, or alleys of this city, in which the public water pipe is laid, and which shall be found by the board of health to contain six, or more, grains of chlorine to a gallon of water, are hereby abolished, and the street commissioner is hereby directed to cause the same to be filled up within ninety days after the passage of this ordinance, and the cost of such work shall be paid out of the city treasury;” and that the defendants are about to, and are, in fact, filling up the wells in pursuance of that ordinance.

It is claimed that each of the owners had a property right in his well, which cannot be taken away, destroyed or interfered with, until just compensation is made therefor, and for this reason the ordinance is void, and that the city has no right to appropriate the public funds for the purpose of filling them up. Much has been said with respect to the nature of the ownership of the property occupied by the streets. The allegations of

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the petition in this regard are general only. Whether the streets were acquired by a statutory plat, by condemnation, or by common law dedication, one or all, we are not informed. It has been held, in this state, that a lot owner has a property right in the street. *Lackland v. North Mo. Ry. Co.*, 31 Mo. 180; *Hannibal Bridge Co. v. Schaubacher et al.*, 57 Mo. 584. And this, too, though the dedication was by the way of a statutory plat. *Rutherford v. Taylor et al.*, 38 Mo. 315; *Price v. Thompson et al.*, 48 Mo. 361; *Thurston v. City of St. Joseph*, 51 Mo. 512. This case, though overruled in other respects, has not been in that under consideration. We do not regard it at all essential to enter into a more minute consideration of the character and extent of such rights in this case. It would be difficult so to do on the general statements of the petition. However the streets may have been acquired, the property cannot be again resumed by those making the dedication. There is no claim here that there was any express reservation, and certainly there can be none in the abutting property owners, inconsistent with the public use to which the property was appropriated.

If these wells were being filled up to accommodate the public travel on the streets there could be no question of the right of the city so to do. Indeed, the city cannot permanently contract away the streets and wharves for private purposes. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121. But this section of the ordinance, by itself, or in connection with the other sections, shows plainly that the wells are not being filled because they obstruct the streets, but as a sanitary measure. May the city do this? The legislature represents the public at large, and has paramount authority over all public highways, no matter how acquired. This authority may be, and is, to a large extent, delegated to the city of St. Louis over the streets therein. The power to regulate the use is not limited to

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a mere right of way, but it extends to all beneficial uses which the public good and convenience may, from time to time, require, as for laying gas, water, and sewer pipes, and the like. New uses are constantly arising. All these, and many others, may be made of the streets without the consent of the lot owners. Private rights must yield to them. *Dillon on Mun. Corp.* (3 Ed.) sec. 690. So, too, the local authorities may build reservoirs and cisterns in the streets. *West v. Bancroft*, 32 Vt. 367. All these uses are to be regarded as included in the original appropriation, and it will not do to curtail the legislative powers in these respects.

In addition to the power to open, vacate, widen, extend, pave, repair and regulate, the use of all the streets, avenues, sidewalks, alleys, wharves, public grounds and squares, the mayor and municipal assembly are authorized, by ordinance, to establish and maintain a sanitary system, to establish and enforce quarantine laws, to secure the general health of the inhabitants by any measures necessary to declare, prevent and abate nuisances on public and private property, and, finally, to pass all such ordinances as may be expedient in maintaining the peace, good government, health and welfare of the city. 2 R. S., p. 1585. None of the objects sought to be secured by municipal government are of more importance than the health of the inhabitants, and hence to that end we find such extensive powers conferred upon the defendant. It would be strange to say that the city may not go as far in the control of its streets, and the removal of objectionable structures therein, for the protection of the public health, as it may in matters of mere convenience to the inhabitants. The statement in the petition is that these wells were constructed with the consent, express or implied, of the city. This, at most, can only be construed to be a license revocable at will. We must hold that this ordinance was passed in the legitimate exercise of the powers conferred upon the

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defendant. The courts ought not to interfere with municipal bodies in the legitimate exercise of those powers by which the peace, health and comfort of the inhabitants are secured. *Weil v. Ricord et al.*, 24 N. J. Eq. 169.

It stands to reason that water percolating through the earth from streets, alleys, vaults, etc., must be more or less unwholesome. As these wells are on public property, and the right to maintain them depends upon a license from the city, the revocation of which is within the legitimate powers of the city government, we hold the ordinance to be valid, and that it operated as a revocation of the license to construct these wells, whether the license was express or implied. It must follow that the plaintiffs are not entitled to compensation.

As to the power to fill up the wells at the public expense, we find nothing in the many provisions of the scheme and charter referred to, which prevents it from so doing.

The judgment is affirmed. All concur.

STRAUS V. THE KANSAS CITY, ST. JOSEPH & COUNCIL
BLUFFS RAILROAD COMPANY, *Appellant*.

1. **Railroad: PASSENGER ALIGHTING FROM TRAIN: NEGLIGENCE.** In an action against a railroad company by a passenger for injuries received in alighting from a train at the company's station, if the train did not stop a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured the company is liable for the injury. Affirming *Straus v. Kansas City, St. Joseph & Council Bluffs Ry. Co.*, 75 Mo. 185. X

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2. — : — : —. If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and without any fault of defendant's servants, he failed to do so, and the conductor not knowing and not having reason to suspect that the plaintiff was in the act of alighting, caused the train to start while he was so alighting, the defendant would not be liable.
3. — : — : —. If a conductor has reason to believe that any passenger who has reached his destination, though dilatory, may be in the act of alighting, and he starts his train without examination, or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable.
4. Practice : REMARKS OF COUNSEL : DISCRETION OF TRIAL COURT. It is for the trial court to determine whether counsel in the conduct of a case, and in argument to the jury, transcend the limits of professional duty and propriety.
5. — : — : PROVINCE OF JURY. Where counsel cannot agree as to the evidence in a cause, or mis-state the evidence, in argument, to the jury, it is the peculiar province of the jury, and not of the court, to determine what the evidence was.
6. — : EVIDENCE : OPINION OF WITNESS. It is not reversible error for a non-expert witness, who testifies to the facts in a case, to give an opinion based upon such facts.

Appeal from Buchanan Circuit Court.—HON. JOS. P. GRUBB, Judge.

AFFIRMED.

Strong & Mosman for appellant.

(1) The court erred in giving plaintiff's first instruction. The fact that the company has been guilty of negligence, followed by an injury, does not make it liable, unless the injury was occasioned by that negligence. *Harlan v. Ry. Co.*, 65 Mo. 25. It affirmatively declared that plaintiff was entitled to "a reasonable time to pass from his seat in the car to the station platform." This was not warranted by the law or the facts. *Imhoff v. Ry. Co.*, 20 Wis. 344; *Straus v. Ry. Co.*, 75 Mo. 191. The instruction ignored the question of negligence, the

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gist of the action. *State v. Hill*, 69 Mo. 451; *Moffatt v. Conklin*, 35 Mo. 453; *Randle v. Ry. Co.*, 65 Mo. 325; *Brown v. Street Ry.*, 49 Mich. 153; *Mitchell v. Ry. Co.*, 51 Mich. 236. "The instruction in question withdraws from the jury all attendant circumstances, and predicates the right of plaintiff to recover upon the mere failure to stop the train, and plaintiff's injury in attempting to get off just as the train started, thus ignoring facts essential to a recovery by plaintiff." *Price v. Ry. Co.*, 72 Mo. 418-20; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Staples v. Canton*, 69 Mo. 592; *Brown v. Congress Street R. Co.*, 49 Mich. 153; *Chicago Ry. v. Smith*, 46 Mich. 510; *Mitchel v. Ry. Co.*, 51 Mich. 236; *Haley v. Ry. Co.*, 25 Kas. 56-7; *Ry. Co. v. Flinn*, 24 Kas. 640; *Wyatt v. Ry. Co.*, 62 Mo. 408; *Hulsenkamp v. Ry. Co.*, 34 Mo. 54; *Thomas v. Babb*, 45 Mo. 387-8. It was inconsistent with the other instructions. *Thomas v. Babb*, 45 Mo. 384; *Seymour v. Seymour*, 67 Mo. 303; *Modisett v. McPike*, 74 Mo. 636. It was in conflict with the other instructions. *Price v. Ry. Co.*, 77 Mo. 508; *Stevenson v. Hancock*, 72 Mo. 614. (2) There was no evidence upon which to base the second instruction for plaintiff. *Price v. Ry. Co.*, 72 Mo. 416; *Edens v. Ry. Co.*, 72 Mo. 212; *Ry. Co. v. Stark*, 38 Mich. 714. (3) Plaintiff's fourth instruction was an abstract proposition of law, too general in its terms, and misleading. *Price v. Ry. Co.*, *supra*; *Yarnall v. Ry. Co.*, 75 Mo. 583; *Nicholas v. Winfrey*, 79 Mo. 551. (4) Plaintiff's fifth instruction was too general. *Stewart v. Clinton*, 79 Mo. 603; *Curtis v. Ry. Co.*, 20 Barb. 282. It was not based on the evidence. *State ex rel. v. Emerson*, 76 Mo. 608. It assumed facts. *State v. Wheeler*, 79 Mo. 366; *Merritt v. Given*, 35 Mo. 98. It did not fairly and plainly state the law. *Railroad v. Thul*, 32 Kas. 255; *Callaway County v. Clark*, 32 Mo. 305; *Taylor v. Monroe*, 43 Conn. 96; *Machine Co. v. Ry. Co.*, 7 Mo. 203; *Lambert v. Craig*, 12 Pick. 199. The damages

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were excessive. *Kalb v. O'Brien*, 86 Ill. 210; *Delie v. Ry. Co.*, 51 Wis. 400; *Sawyer v. Ry. Co.*, 37 Mo. 264. (5) The instructions given by the court were erroneous. (6) It was error to refuse defendant's first, third and fifth instructions. They were justified by the pleadings and the evidence. Defendant's sixth instruction was given by the court on its own motion, on the former trial, and should have been given. The defendant's second, ninth, tenth and thirteenth instructions should have been given. They were supported by the evidence and were not embraced in others given, and were correct applications of the law to the facts of the case. (7) The court erred in permitting the witnesses, Hose and Mrs. Jackson, to testify to their opinions. *Sparr v. Wellman*, 11 Mo. 234; *N. E. Glass Co. v. Lovell*, 7 Cush. 321; *White v. Ballou*, 8 Allen, 408; *Gavisk v. Ry. Co.*, 49 Mo. 277; *Koons v. Ry. Co.*, 65 Mo. 597-8; *Wagner v. Jacob*, 26 Mo. 530. (8) The case should be reversed for the remarks of plaintiff's counsel, in his opening speech to the jury. *State v. Lee*, 66 Mo. 165; *State v. Upham*, 38 Me. 261; *Fletcher v. State*, 49 Ind. 124; *Devies v. Haywood*, 63 N. C. 53; *Rolfe v. Rumford*, 66 Me. 564; *Brown v. Swineford*, 44 Wis. 282; *Cleveland Paper Co. v. Banks*, 15 Neb. 22; *Coble v. Coble*, 79 N. C. 589; *State v. Mahly*, 69 Mo. 315.

Woodson, Green & Burnes for respondent.

(1) The plaintiff's first instruction properly declared the law. *Straus v. Ry. Co.*, 75 Mo. 185. (2) Plaintiff's second instruction was supported by the testimony. It did not present a theory of the case not stated in the petition. (3) Plaintiff's fourth instruction was a correct statement of the law. (a) The question as to whether there was any contributory negligence is one for the jury to determine in all cases in which there is any conflict of evidence on the point. *Filer v. Ry. Co.*, 49 N. Y. 47;

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Greenleaf v. Ry. Co., 29 Ia. 14; *Herrick v. Sullivan*, 120 Mass. 576; *Canal Co. v. Bentley*, 66 Pa. St. 30; *Newhouse v. Miller*, 35 Ind. 436; *Smith v. Ry. Co.*, 61 Mo. 588; *Manley v. Ry. Co.*, 74 N. C. 655; *Willard v. Pinard*, 44 Vt. 34; *Schierhold v. Ry. Co.*, 40 Cal. 447; *Ry. Co. v. State*, 36 Md. 366; *Ry. Co. v. Brady*, 17 Kas. 380; *Ry. Co. v. Mason*, 51 Miss. 234. (b) And the burden of proof is on the defendant to show contributory negligence. *Frech v. Ry. Co.*, 39 Md. 574; *Hays v. Gallagher*, 72 Pa. St. 136; *Hoyt v. Hudson*, 41 Wis. 105; *Hocum v. Weithrick*, 22 Minn. 152; *New Jersey, etc., Co. v. Nichols*, 32 N. J. Law, 166; *Ry. Co. v. Gladman*, 15 Wall. 401; *Buesching v. Gas Light Co.*, 73 Mo. 229. (c) Plaintiff is not bound to prove due care on his part, but the jury are at liberty to infer it from absence of appearance of fault on his part, either positive or negative. *Mayo v. Ry. Co.*, 104 Mass. 137; *Marble v. Ross*, 104 Mass. 44; *Johnson v. Ry. Co.*, 20 N. Y. 65; *Ry. Co. v. Cragin*, 71 Ill. 177. There was no evidence of contributory negligence on the part of plaintiff. (4) Plaintiff's fifth instruction is supported by the evidence. The jury had the right to take into consideration plaintiff's age, situation in life, bodily and mental anguish, and expenses caused by the accident. *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235; *Ransom v. Ry. Co.*, 15 N. Y. 415; *West v. Forrest*, 22 Mo. 344; *Bannon v. Ry. Co.*, 24 Md. 108. (5) Plaintiff's fifth instruction was correct. *State v. Anderson*, 19 Mo. 241; *Rose v. Bates*, 12 Mo. 30. (6) The fourth instruction, given by the court of its own motion, was not prejudicial to defendant. Plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of a resulting injury to himself. *Ellis v. Railroad*, 2 Ired. (N. C.) Law, 138; *Herring v. Ry. Co.*, 10 Id. 402; *Scott v. London Dock Co.*, 3 Hurl. & C. 596. (7) The seventh instruction, given by the court, of its own motion, was

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not prejudicial to defendant. The jury, from the facts, are to say whether the plaintiff contributed to the injury. Cases *supra*, third; *Bigelow v. Reed*, 51 Me. 325; *Wilds v. Hudson Railroad*, 24 N. Y. 430; *Hoben v. The Burlington, etc., Ry. Co.*, 20 Iowa, 562; *Brand v. Schenectady, etc., Ry. Co.*, 8 Barb. 368. (8) The statements made by Mr. Green, one of the plaintiff's counsel, were arguments fairly deducible from the facts. The matter was not material to the issue, and not being material, it cannot be alleged as ground for reversal. (9) That part of the testimony of Hose and Jackson, to which defendant excepts, was clearly competent, because it was a question that was susceptible of no better evidence.

NORTON, J.—This cause is before us for the second time on defendant's appeal from a judgment of the circuit court of Buchanan county. Plaintiff, who was a passenger on defendant's train, destined for Pickering, a station of its road, sued to recover damages for injuries sustained by him, by reason of the alleged negligent failure of defendant to stop its train a sufficient length of time at said station to enable him to get off at said station, and in prematurely starting the train while he was in the act of alighting, whereby he was thrown between the cars and platform of the depot and injured.

The opinion delivered in this case when it was first before the court, is reported in 75 Mo. 185. The evidence bearing on the point there raised by counsel, and, also, now raised, that there was no evidence on which to submit the question to the jury, that the conductor either knew, or had good reason to believe, that plaintiff was in the act of alighting from the train, when he ordered it to start, is thus stated in the opinion: "The plaintiff himself testified as follows: 'On the twenty-sixth day of November, 1877, I was a passenger on the defendant's train, going to Pickering. Just as the train whistled for

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Pickering, I got up from my seat and went to the door of the car. When it stopped, I opened the door and started out, and the car started, just as I was in the act of getting off, with a sudden jerk, and I was thrown down between the car and the platform, and rolled around till I got to the end of the platform.' * * * Several witnesses testified that the plaintiff told them, a short time after the accident, that he had been traveling on trains so much that he had become careless; that he did not notice that the train was moving, and that he got off backwards, and that nobody was to blame for his getting hurt but himself. * * * The plaintiff, on his cross-examination, admitted that he stated to several persons that the conductor was not to blame, but said he so stated because he did not wish to get the conductor into trouble. But he denied that he ever stated to any one that no one was to blame but himself. The conductor testified as follows: 'The train stopped still. The stop was at least for one-half minute. We stopped the usual length of time for stops at stations at which no business is to be transacted. After the train stopped I walked out on the depot platform, walked across to the corner of the depot and leaned up against the building a few seconds. * * * As I went across the platform to the depot, I looked to the left, over my shoulder, to the rear of the train, and saw the plaintiff coming down the steps of the car. I leaned against the depot a few seconds, and then gave the signal to the engineer to go ahead, and walked across the platform to the door of the baggage car and went in. I went into the same door I came out of; went back into the same car. The car had not started, when I went into it.' The station agent at Pickering testified, in substance, that after the train stopped, he walked from his office across the platform to the train, got his mail from the train, and returned to the office door before the train started. He saw the plaintiff standing on the car platform looking through

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the door into the car, and saw him after the train started step off the car on the wrong foot, which whirled him around and off his feet."

On this state of facts the judgment was reversed, not because there was no evidence on which to submit to the jury the question whether the conductor knew, or had good reason to believe, that plaintiff was in the act of alighting from the train when he started it, but the judgment was reversed and the cause remanded for another trial on the distinct ground that an instruction which did submit that very question was erroneous only in that it ignored the question as to whether the train in fact was stopped a reasonable length of time to enable the plaintiff to get off, and the further ground that there was a conflict between an instruction given for plaintiff and one for defendant. The point then made that there was no evidence upon which to submit the case to the jury was not sustained, but, on the contrary, in speaking of the facts in evidence the court proceeded to lay down the law applicable, and for the guidance of the trial court on a re-trial, as follows: "If the servants of the defendant did not halt the train at Pickering station a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured, the defendant is undoubtedly liable."

"If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and, without any fault of defendant's servants, he failed to do so, and the conductor, not knowing and having no reason to suspect that plaintiff was in the act of alighting, caused the train to start while he was so alighting, the defendant would not be liable."

An examination of the record now before us shows that the evidence, as to what took place with reference to stopping and starting the train when the accident oc-

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curred, is substantially the same as reported in 75 Mo. *supra*, and it also shows that on the re-trial of the cause the trial court gave an instruction strictly in harmony with the theory indicated in the opinion of the court. For that reason, and believing the questions therein settled, and the principles therein announced to have been correctly settled, and fully supported by the authorities cited in the opinion, we decline to re-discuss or re-investigate them, further than to say that we are not disposed to relax any of the rules of law which impose on a common carrier the strictest observance of the contractual obligations it assumes to a person whom it has received as a passenger, not only in using the utmost care and caution in carrying him, but also the same care and caution in stopping and starting its trains at the station to which it has agreed to carry him.

The conductor, in his evidence, stated that the train stopped thirty seconds, or less; "that he stepped on to the platform at the depot and looked back *southward* to the passenger coach, and saw Straus on the steps of the passenger coach, as though coming down the steps to the depot platform; the train stopped a half minute, or less;" that he walked on four or five steps to the corner of the depot, turned round facing the train, and looked *northward* toward the engine, and gave the signal to start. To hold, under these facts, that the failure of the conductor to ascertain that plaintiff had alighted from the train before he gave the signal to start it, which fact he could have ascertained (and which, under the circumstances, it was his duty to ascertain), had he looked south where he first saw plaintiff on the steps, is no evidence of negligence, would be to hold that a conductor might shut his eyes, under circumstances which made it his duty to look. In the opinion in this case, in 75 Mo., *supra*, it is said that if a conductor "has reason to believe that any passenger, who has reached his destination, has not alighted, and, though dilatory, may be in

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the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable." Although the conductor stated that the train stopped thirty seconds or less, although he saw plaintiff on the steps as though coming down the steps, a few seconds before he gave the signal and started the train, he made neither examination nor enquiry, but instead of simply casting his eye, the work of a moment, south towards the place where he had seen plaintiff a moment before, to ascertain whether he had reached the platform, he looked away from him, to the north, and gave the engineer the order to go, which resulted, according to the evidence of plaintiff, in putting his life in great peril by being rolled between the train and depot platform, and dumped to one side when the end of the platform was reached.

Another ground of objection is that defendant applied for a continuance on account of the absence of one Wallbridge, a material witness, setting out in the application what it expected to prove by him, and thereupon plaintiff admitted that said Wallbridge, if present, would testify as stated in the application, whereupon the court overruled the application, and the trial proceeded, during which the evidence of said Wallbridge, as set out, was read to the jury. After all the evidence was put in and instructions given, Mr. Green, one of plaintiff's counsel, in his opening speech to the jury, said: "Why is not witness Wallbridge here to testify and let us cross-examine him? He lives here in this city; he has left defendant's employ. They (meaning defendant's counsel), tell us he has been sent for and won't come. Why won't he come? While he was in their service he swore to suit them. He will not come now and swear to the truth for fear of being prosecuted for perjury by this soulless railroad corporation," or language

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to that effect. When defendant's counsel objected to this line of argument, and asked the court to interfere and rebuke counsel for discussing facts not in evidence, the court interfered no further than to tell the jury, in substance, that they were only to consider such matters as were shown by the evidence. The circuit judge who heard these remarks, and was cognizant of the circumstances under which they were made, and who was presumably acquainted with the intelligence of the jury to whom they were made, and with the ability of counsel for defendant, who were to follow Mr. Green, to explain to the jury that defendant had asked the court to continue the cause on account of the absence of Wallbridge, and in order that it might have him in attendance, and that the continuance was prevented by the admission of Mr. Green himself, that the witness, if present, would testify to the facts as set out in the application, was in a better position than we are to determine how far he should interfere and rebuke counsel, and whether what was said would or not be likely to prejudice the jury against the defendant. *State v. Hamilton*, 55 Mo. 520.

The court did interfere, and what was said by the judge to the jury was equivalent to telling them to disregard the remarks made by Green. Can we say that the trial judge exercised his discretion improperly in not going further than this? If so, what rule shall be laid down for the government and guidance of *nisi prius* judges in such cases? Looking at it from my standpoint, and presuming, as I may (what the circuit court, perhaps, knew), that those who composed the jury were men of ordinary intelligence, and understood the obligations of the oath they had taken, such remarks, if calculated to prejudice them at all, would be more likely to prejudice them against the plaintiff than defendant, because of his counsel having resorted to a line of argument so easily exposed and turned against him. This court has in sev-

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eral instances reversed judgments where counsel, in the closing argument, where there was no opportunity for reply, were permitted to mis-state the law without rebuke, but in no case, that I am aware of, has this been done when improper remarks were made as to the evidence, by counsel in an opening argument, where such statements could be corrected by counsel in reply. It is the common experience of all judges that in most trials had before them, where there is evidence on both sides, that opposing counsel differ in their understanding as to what the evidence was in the case, and in such cases it is the peculiar province of the jury, and not of the court, to determine between them.

During the trial plaintiff read the deposition of Andrew Hose, who testified that "he was on the train when plaintiff was injured, and that the train came to a dead stop and started immediately; that he, Straus, as soon as the train stopped, walked out of the car to get off, and just as he was stepping off, the train started with a jerk and he fell; Straus was standing right in the car door, and as soon as it halted he walked out to get off; [the stop of the train was not long enough for him to step from the car door to the platform, in my opinion.]" The above statement, included in brackets, was objected to on the ground that it was the expression of the opinion of the witness; the objection was overruled, and the evidence received. The deposition of Amanda Jackson was also read, who testified as follows: "I was on the train at the time a young man by the name of Straus was injured; he was sitting in front of me; at the time the train came to Pickering I was about the center of the train, and he was in front of me. As the train approached the depot at Pickering, he started to get off; the train did not come to a stand still, at all, to the best of my knowledge. [I don't think it stopped long enough for any one to get off with safety.] I don't think it stopped at all." The same objection was made to such

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of the above as is included in brackets, which was also overruled. This action of the court is also assigned for error.

If these witnesses had been allowed simply to give their opinion, without more, that the train did not stop long enough for plaintiff to get off, the rule invoked by defendant that a witness should not be permitted to give his opinion, but should state facts, would apply, and might justify an interference with the judgment. But in this case, Mrs. Jackson expressed the opinion that the train did not stop long enough for plaintiff to alight, and swore as a fact that the train did not stop at all, and emphasizes this fact by repeating it. Witness Hose expressed the same opinion, and in the same connection swears positively to facts conclusively showing that the train did not stop long enough for plaintiff to alight; he testified that as soon as the train stopped he saw the plaintiff walk out of the car door to get off, and, just as he was stepping off, the car started with a jerk, and he fell. In face of the facts thus sworn to by these witnesses, and the statutory prohibition (section 3775) that no judgment shall be reversed unless error has been committed materially affecting the merits of the action, to reverse this judgment for the last error assigned would be wholly unwarranted. Besides this, the rule that the opinion of a non-expert witness is not to be received in evidence, has its exceptions. Where the value of property is in question, a witness, who states that he is acquainted with the value of that kind of property, may give his opinion of the value of the property in dispute. So, where the question of the sanity of a person is involved, a witness may give his opinion, provided he states the facts upon which it is founded. The length of time that the train stopped, to some extent, involved an expression of opinion. When the conductor

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testified that the train stopped "half a minute or less," it was nothing more than the expression of his opinion.

The instructions given in the case, being in strict harmony with the law as laid down in 75 Mo., *supra*, and finding nothing in the record justifying an interference with the judgment, it is hereby affirmed. Ray and Black, JJ., concur.

SHERWOOD, J., DISSENTING.—Called upon as one of the judges of this court to say whether I concur in the foregoing opinion, I say I dissent, and I say so for these reasons:

I. *There is not a scintilla of testimony that the conductor knew that plaintiff was in the act of alighting when he gave the signal for the train to start.*

The tendency of the testimony, and its only tendency, is to show that the conductor had every reason to believe that the plaintiff, seen by him on the steps of the rear passenger car, and in the apparent act of alighting on the platform, had stepped down from the car, before he gave the starting signal. The conductor was in the baggage car when the train stopped; he stepped out of the side door of the baggage car, and as he did so, looking southwardly, he saw plaintiff on the steps, etc., and then the conductor, being on the depot platform, walked four or five steps or more across that platform to the corner of the depot building, then turned around, facing the train and looking northward toward the engine, called out, "all aboard," and raised his hand, gave the signal to the fireman for starting, then walked back across the depot platform to the baggage car from which he had come, mounted into it, and after he did so, the train, which had stopped its usual length of time, started; and after the train had moved some sixty feet it was stopped by the ringing of the bell.

The testimony of the conductor is supported by that of the station agent Harmon, who testified that the

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train stopped the usual time; who, hearing the train approaching, took the United States mail sack in one hand, and some company mail in the other, and when the train stopped, came out of the depot door just as it did so, saw plaintiff on car platform in front of him; walked diagonally across station platform in a northeast direction, twenty-five or thirty feet, to the door of the baggage and mail car, exchanged mail with the United States mail agent and baggage man, turned and walked back to door of depot; turned around before going in, saw plaintiff coming down the car steps, the car standing still, with his attention divided between what he was doing and the car window; and when the car commenced to move, noticing plaintiff was inattentive and was about alighting on his *right foot*, and, knowing this would be dangerous, called out to him, "look out, or you will fall," when plaintiff, who was facing westward, the car moving northward, touched, or appeared to touch, the platform with his *right foot* and fell forward with the train, and that if he had been paying attention to what he was doing he need not have fallen at all. Harmon, also, corroborates the testimony of Heaton, the conductor, as to the latter getting off the train after it stopped, walking across the depot platform to the corner of depot, turning, calling "all aboard," and giving the signal for starting the train. The testimony of Harmon is supported by that of *plaintiff himself*, who says that, as he was coming down the steps of the car, he saw Harmon, the station agent, standing near the door of the waiting room facing him; that Harmon called out, as he was on the bottom step in the act of stepping off, "*look out, or you will fall;*" that he does not know *on which foot* he tried to alight. Bryant, also, fully corroborates the conductor's testimony. And the plaintiff, when on the stand, testified that *he did not blame the conductor for being hurt*; that he had testified on a former trial that he told Clutter and Southerland the

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same thing. Several witnesses testified that plaintiff had made similar statements to them.

The foregoing is substantially a correct *resume* of the evidence on the point of the conductor's knowledge of the plaintiff's *status* at the time he signaled the train to start. If there is in the record before me the slightest trace or indication of such knowledge, a patient reading of the evidence has failed to disclose it. If this be true, then it must follow that the second instruction given on behalf of plaintiff, was fatally erroneous, and that there was no evidence on which plaintiff could base a recovery. In my opinion, the plaintiff's sworn admission, that the *conductor was not to blame*, is intrinsically sufficient to send the cause out of court, as much so as if the plaintiff had in terms admitted that the *defendant company* was not in fault. If the *conductor* was not to blame, *who was, pray?* This is sufficient to dispose of this cause without more. When it was here before, the evidence was not discussed, so far as we can judge by the report in 75 Mo. 185. But it was then and there declared "as the settled law of this state that when the concurring negligence of a plaintiff proximately contributes to produce the injury complained of, there can be no recovery, unless such injury is, also, the direct result of the omission of the defendant, *after becoming aware of the danger to which the plaintiff was exposed*, to use a proper degree of care to avoid injuring him." Applying that principle now, and bearing in mind the evidence, what becomes of plaintiff's case?

II. I have not the time to discuss the instructions in detail. Of those for the plaintiff, the first one will be found, on examination, to violate the rule so frequently and so recently announced by this court, that hypothetical instructions, which authorize a recovery, must set forth *all the facts* authorizing such recovery. *Sullivan v. Ry.*, Oct. Term, 1885, and cases cited.

III. If it be said of the evidence in this cause that

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it is the same, substantially, as before, and that this court, by failing to discuss it, has tacitly sanctioned its sufficiency, I have this to say, that this court, when this cause was here before, seems to have contented itself with pointing out several errors in the instructions, and then, after announcing the controlling principle of law in the case, to have sent it back, possibly for re-trial. Sometimes cases are treated too gingerly, sent back to plague the trial courts, and then to return to us, when, if the evidence were carefully examined, it would have been found that plaintiff's own evidence gave him no standing in court. But, granting that this court committed error in failing to discuss the evidence when the cause was here before, this should not preclude us from doing so *now*. Error is not sacred; it has no vested right to existence; and it becomes us as *men*, certainly as *judges*, whenever error is discovered for the first time, to confess and to forsake it at the earliest opportunity. Prov. xxviii., 13.

A noted example of this kind, in this court, is found in the case of *Hamilton v. Marks*, 63 Mo. 167, where the trial court having tried the cause on a correct view of the law, this court, in 52 Mo. 78, reversed the judgment and sent it back for re-trial on an incorrect doctrine, and it was thus re-tried, but on coming back here, the law was correctly declared, just as the circuit court first held, and the judgment was again reversed. And that case by no means stands alone in the judicial annals of this court. And, in my opinion, it makes no matter that the error was one *in pais*, instead of one in law. If gross and palpable injustice has been done, such as I think has occurred in this case, it should be corrected, and it will be a reproach on the administration of justice if it be not done.

Let me mention another case where this court, being apprised thereof, has confessed and forsaken its error; error committed and error forsaken in the same cause.

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Take the case of *Bell v. Ry. Co.*, 72 Mo. 50. A boy was standing on the railroad track in broad daylight, and while standing there was run over and killed by a passing train of cars; the evidence was discussed and so were the instructions, but the evidence was not declared insufficient; several of the instructions were declared improper, and the judgment was reversed and the cause remanded, *presumably* for a new trial, as no hint or intimation was given contrawise. Well, the cause was re-tried on the *theory of the law, as laid down by this court*, and the plaintiff again recovered, and the defendant came here again on appeal; the evidence *all one* as before; the cause was re-argued, Ray, J., wrote the opinion of the court, affirming the judgment; a motion for re-hearing was filed on the ground that there was *no evidence to support the verdict*. What did this court do? Did it continue to wallow in the slough of flagrant misapprehension into which it had fallen? Nay, verily. It granted the motion; it re-heard the cause; it reversed the judgment on the *sole* ground that there was *no evidence*, whereon to build the verdict. Norton, J., concurring, *post*, p. —. Why not take the same course now?

But in this case it is said that, "the point then made that there was no evidence upon which to submit the case to the jury was not sustained," etc. In *Bell's case*, such a point *was not taken until the cause was argued here the second time*. Is it right to *punish the vigilant and reward the negligent*? *Queer law and justice that.*

IV. The judgment should be reversed because of the admission of testimony of witnesses, non-expert, that the train did not stop long enough for any one to get off with safety. This was incontestably erroneous; a mere guess at best, and usurped the province of the triers of the facts. This point was not passed upon when the cause was here before, and the same observation applies to some other points I have touched upon.

V. The judgment should be reversed because of the

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remarks made by counsel in reference to the absent witness, Wallbridge. The application for a continuance was in full and regular form, and authorized a continuance, which would have been granted, had not the counsel for plaintiff, under the provisions of section 3596, Revised Statutes, admitted that the witness, if present, would swear as in the affidavit set forth. This admission was made, and that portion of the affidavit which related to Wallbridge's evidence was read on the trial, which was all of the affidavit that could be read; but plaintiff's counsel, against the earnest protest of counsel for defendant, was permitted to make the remarks already set forth in the opinion of the court. For similar remarks the judgment in a criminal cause was recently reversed in this court. *State v. Barham*, 82 Mo. 67, Norton, J., delivering the opinion. I can discover no reason why the same principle does not apply in a civil cause in similar circumstances. The statutory provisions referred to, are, at best, but a beggarly substitute for oral testimony, granting that the statute is constitutional. But, certainly, the diminished and feeble force of such statutory evidence should not be allowed to be still further weakened by remarks of counsel, who have solemnly agreed that the facts so stated shall be read in evidence; and who then is allowed, without rebuke, to attack the very paper, but for the admission of whose recitals the cause would have been continued. I will not sanction, by my concurrence, such a travesty of judicial proceedings.

VI. The judgment should be reversed because counsel were permitted to palpably and grossly mis-state the facts in evidence. The views of this court in the *State v. Emory*, 79 Mo. 461, as to all proper invective that can be indulged in by counsel in the course of argument, I regard entirely correct, but counsel must not go further than this; must not travel entirely out of the record, and appeal to the prejudices and passions of the jury by invective, based upon simulated facts; and do this,

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too, without even the semblance of the mildest form of rebuke from the trial court. Counsel for defendant cites authorities for this position, but the principle is too plain to require a precedent.

For these reasons, I am for reversing the judgment.

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1. **Homestead.** The law in force, at the time of the death of the husband, determines the homestead rights of the widow.
2. **Devise of Lands to Widow : HOMESTEAD.** A widow cannot take a devise of land under her husband's will and also claim a homestead in his lands.
3. ——— : ——— : **ELECTION.** In such case she must make her election, but no formal act of election on her part is required, and it may be determined from her acts and conduct whether she chooses to accept the provisions of the will or to take a homestead.
4. ———. The widow's right of election in such case is not transmissible to her heirs.

Error to Livingston Circuit Court.—HON. JAMES M. DAVIS, Judge.

AFFIRMED.

L. H. Waters for plaintiffs in error.

- (1) As the law stood when the husband died the widow took an estate in fee-simple to the extent of a homestead, and on her death it went to her heirs, lineal and collateral. *Skouton v. Wood*, 57 Mo. 330; *Gragg v. Gragg*, 65 Mo. 346; *Brown v. Brown*, 68 Mo. 338.
- (2) It was an estate created by the statute and beyond

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the power of the husband to dispose of by will. *Register v. Hensley*, 70 Mo. 194; *Bryant v. McCune*, 49 Mo. 546; *Hastings v. Myers*, 21 Mo. 519; *Reddish v. Walsh*, 15 Mo. 537. (3) It vested by operation of law, and any disposition of it, except as authorized by law, was absolutely void. *Howe v. McGiven*, 25 Wis. 525; *Brutten v. Fox*, 100 Mass. 234; *Cox v. Wilder*, 2 Dill. C. C. 46; *Hubbell v. Canady*, 58 Ill. 425. (4) It was not necessary that the widow should have asserted her claim; it is sufficient if she did nothing to waive or defeat her right. *Vogel v. Montgomery*, 54 Mo. 584; *Cox v. Wilder*, 2 Dill. C. C. 46; *Myers v. Ford*, 22 Wis. 139. (5) Section 15, page 541, Wagner's Statutes, relates to dower in real estate only, and does not affect dower in personalty, nor can it be applied to the homestead. *Halbert v. Halbert*, 15 Mo. 453; *Pemberton v. Pemberton*, 29 Mo. 412. A devise, in order to defeat a widow's right to a homestead, must have been in lieu thereof, or utterly inconsistent therewith. *Bates v. Bates*, 97 Mass. 375; *Gragg v. Gragg*, 65 Mo. 396. And no provision in a will can defeat the homestead, unless the widow takes under such provision and is thereby concluded from claiming homestead. *Meech v. Est. of Meech*, 37 Vt. 414; Thompson on Homesteads, sec. 545. (6) The fact that she said to some of her neighbors that she was satisfied with the will was not an admission inconsistent with her claim to a homestead. No sale was made by the administrator until after her death, and no one pretends to have acted upon her statement. *Taylor et al. v. Zebb*, 14 Mo. 488; *Valle v. Clemens*, 18 Mo. 457; *Wallace v. Truesday*, 6 Pick. 456; *Newman v. Hook*, 37 Mo. 207; *Rogers v. Marsh*, 73 Mo. 67. (7) In California it has been held that acceptance of letters of administration by a widow who is residuary legatee does not amount to a waiver of homestead. *Sulzberger v. Sulzberger*, 50 Cal. 385. (8) This is a contest between the widow's heirs and the purchasers at the

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administrator's sale. The entire estate was sold to pay Rossen's debts, and the purchasers at that sale now insist that the provisions of Rossen's will, under which the widow got nothing, preclude her heirs from claiming a homestead. First Leading Cases in Equity, 536. (9) Plaintiffs are not concluded from claiming the homestead because some of them bid on some of the lands sold by the administrator, nor because they did not commence this suit until nearly two years after that sale. Four hundred acres of land were sold. There is not a word of proof that any of them bid on the lands embraced within the homestead.

C. H. Mansur and L. T. Collier for respondents.

(1) Charles Rossen died in July, 1874, and the law, as it then existed and was in force, must control in this case. *Register v. Hensley*, 70 Mo. 189; *Brown v. Brown*, 68 Mo. 390. (2) Mrs. Mahala Rossen was bound to renounce the provisions of the will of her deceased husband, Charles Rossen, made in her favor, before she could lawfully claim a homestead in the lands of which he died seized, and having failed to elect, to repudiate the will and its provisions made in her behalf, and to file her renunciation thereof, she in law elected to take under the will, and there is no homestead right in the plaintiff. (3) The right of election being personal, it is not transmissible by descent. *Welch v. Anderson*, 28 Mo. 299; *Sherman v. Newton*, 6 Gray, 307.

HENRY, C. J.—Plaintiffs instituted this suit in the Livingston circuit court, asking to have a homestead set apart to them as heirs of Mahala Rossin, who, they allege, died seized of the same. The defendant had a judgment, and plaintiffs have brought the case here on writ of error.

Charles Rossin, the husband of Mahala, died in

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1874, having by will devised to his said wife eighty acres of land in fee, and a life estate in one hundred acres additional, and bequeathed to her all his personal estate. To others he devised other tracts of land which, with that devised to his wife, constituted his farm. His wife he appointed executrix of his will, which was probated in 1874. Mrs. Rossin qualified as executrix immediately after the probate of the will, but died in 1875, about one year after the death of her husband, having continued her residence on the premises in controversy, where she and her husband had lived for many years. They were childless, and the plaintiffs are Mrs. Rossin's heirs at law. After her death, Albert Stephens was appointed administrator *de bonis non* of her husband's estate, and, pursuant to an order of the probate court of Livingston county, made in July, 1877, sold said land for payment of debts, and John T. Moss purchased, and received the administrator's deed for the same. The order of sale and sale were regular in all respects, and there is no controversy as to their validity, if Mrs. Rossin had no homestead right in the premises. The law in force when Charles Rossin died gave a widow a fee in a homestead, and such was Mrs. Rossin's estate, if she had a homestead right at all.

The defendants claim under Moss. After the death of her husband, Mrs. Rossin qualified and acted as executrix of his last will, and was administering the estate under the will when she died. She repeatedly expressed herself as satisfied with the provisions of the will. She took all of the personal estate of the testator under the will, a provision different from and greater than that made for her by the dower act. There was, it is true, no formal acceptance by her of the provisions of the will; neither did she do or say anything indicative of a purpose to renounce them and claim her homestead. She died without having in any manner repudiated the

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will ; but, on the contrary, from the date of its probate to her death, was administering the estate under the will. Plaintiffs, however, are endeavoring in her stead to renounce the provisions of the will, but the right of election is not transmissible by descent. *Welch v. Anderson*, 28 Mo. 298.

She could not take the devise and bequest under the will, and, at the same time, insist upon her homestead right. The right under the will, and that confirmed by the homestead law, were repugnant to each other, and she had to repudiate the one or the other. There is no provision in the homestead law prescribing a formal election or repudiation, similar to those to be found in the law concerning dower and jointure ; but, after the death of her husband, the widow is *sui juris*, and her conduct in relation to her property is treated precisely as that of any other person. There was no one living, except herself, who had any interest in her homestead. She had no children, nor had her husband any. The law gave her the homestead, but she had a perfect right to dispose of it. If, by his will, her husband gave her a different estate in the land from that which the law gave her, she had a perfect right to accept it in lieu of the homestead. No time is specified within which she should make her election, and she could make it immediately. Nor is any particular manner of making the election prescribed. Accepting the bequest under the will, qualifying and acting as executrix of the will, and repeatedly expressing her satisfaction with its provisions in her behalf, are sufficient to prove her acceptance of these provisions, certainly against her heirs. For, even conceding that the above recited acts would not have precluded her from withdrawing such acceptance and asserting her right to a homestead, if she had lived, yet, her acceptance of the provisions of the will cannot be withdrawn by her heirs. It is not a right transmissible by descent. The status of her homestead right is the

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same as at her death. Besides, the plaintiffs all lived in the neighborhood. Some of them were present at the sale of the land by the administrator, and several of them bid for the land at the sale, and none of them made an announcement of their claim when it was sold. Mrs. Rossin died in 1875 and this suit was not commenced until September, 1879, and plaintiffs never before, so far as disclosed by this record, laid claim to the land. The defendants purchased without notice of any claim of plaintiffs, and have made valuable, lasting improvements upon the land.

We think that both the law and equity of the case lie with the defendants, and affirm the judgment. All concur.

MUSSER V. ADLER *et al.*, *Appellants*.

1. **Practice : INSTRUCTION.** A party cannot complain of an instruction given at his own request.
2. **Pleading : SPECIAL PLEA.** The defence that the services sued for were contrary to public policy, should be pleaded.
3. ——— : **GENERAL DENIAL : SPECIAL PLEA.** A general denial puts in issue the facts alleged in the petition, and not the liability arising therefrom. The facts, from which the law draws the conclusion of defendant's non-liability, must be specially pleaded in the answer when they are not stated in the petition.
4. **Instructions : COMMENTING ON EVIDENCE.** While an instruction should not comment on the evidence, nor single out one or more facts and give them undue prominence, yet an instruction, in an action for the recovery of the value of services rendered as an attorney, is not so objectionable, which tells the jury that in considering the value of the plaintiff's services they should take into consideration the magnitude of the cases in which they were rendered ; the skill required to perform the same so far as possessed by plaintiff ; the time required in the trial and preparation of the

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causes, and all the facts and circumstances touching the services so rendered.

5. **Verdict.** A verdict held not open to the objection of being too indefinite and uncertain.

Appeal from Buchanan Circuit Court.—HON. WILLIAM H. SHERMAN, Judge.

AFFIRMED.

Woodson & Crosby and Vinton Pike for appellants.

(1) The court erred in giving plaintiff's third instruction. It is a commentary on portions of the evidence. *Rose v. Spies*, 44 Mo. 26; *Head v. Hargrave*, 105 U. S. 45. (2) Plaintiff's third instruction was also erroneous. Under it there was no need of any proof of the value of any service. (3) Plaintiff's ninth instruction was not warranted by the evidence. The court could not tell the jury that the criminal case mentioned in it was of great or little importance. (4) The instructions given for plaintiff are argumentative, commentaries on the evidence, and assume facts in issue. (5) Defendants' first and second instructions should have been given. R. S. U. S. 1878, sec. 1782; *Arrington v. Sneed*, 18 Tex. 135; *Goodenough v. Spencer*, 46 How. 347. (6) The verdict is insufficient, indefinite and uncertain. "The amount of the recovery" is not assessed. *Cates v. Nickell*, 42 Mo. 169; *Burghart v. Brown*, 60 Mo. 24; R. S., sec. 3634; *Bruck v. Maulsberry* (S. C. Pa.) 14 Lanc. Bar, 194.

• *B. R. Vineyard and H. K. White* for respondent.

(1) Plaintiff's instructions fairly stated the law, and are not objectionable as being commentaries on the evidence. (2) Plaintiff's ninth instruction was properly given. It was not only right, but necessary to apprise

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the jury of the magnitude and importance of the controversy in which plaintiff had been employed to act, and of the responsibility thrown on him thereby. *Eggleston v. Boardman*, 37 Mich. 18; *Vilas v. Downer*, 21 Vt. 419; *Kentucky Bank v. Combs*, 7 Pa. St. 543; *Duncan v. Yancy*, 1 McCord (S. C.) 149. (3) The court properly refused defendants' first and second instructions. (4) The verdict of the jury is sufficient in form. *Davenport v. Fulkerson*, 70 Mo. 417; *Muller v. The St. L. H. Association*, 73 Mo. 242; *Gibson v. Lewis*, 27 Mo. 533; *Wilson v. Means*, 25 Kan. 83.

BLACK, J.—The defendants were partners as rectifiers and wholesale dealers in liquors. They became involved in much litigation, civil and criminal, in the United States courts. The plaintiff, in connection with other attorneys, rendered them services in these suits and matters incident thereto, from 1875 to 1879, and to recover for these services from March, 1876, this suit was brought. The answer was first a general denial; and, second, new matter, by which defendants admit that plaintiff rendered them services, but they say that from 1875 to 1879 they, at different times, paid him, in all, \$2,155.40, which was all his services were worth. The reply admits these payments, but alleges that they were made for services before March, 1876, except two items, for which credit is given. Among the items of the account filed with the amended petition, is one for one thousand dollars for services in preparing papers, etc., in and about procuring a remittance of ten thousand dollars from a fine of twenty thousand dollars, which had been adjudged against the defendants. Four other items were for fifty dollars each in going to Chillicothe and elsewhere, to see the district attorney and co-counsel, in reference to a compromise of a judgment *in rem* against defendants' property, and the prosecu-

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tion of a suit of the United States against Wilkinson and others.

Evidence was offered on both sides as to the value of all these services. The plaintiff testified that an effort had been made to get the fine remitted. Cox, who had the matter in charge, wrote that it was useless to make any further effort, unless the department were satisfied that defendants were unable to pay the fine. Defendants, thereupon, consulted plaintiff, and from their showing it appeared that they had property enough to pay the fine five times over. He said he could not then tell them what to do, but would take time to study up a plan to make such showing as Cox had asked for. Some weeks after he proposed to them to have their property, which was then being assessed, assessed as low as they could, and to forward abstracts of the assessment to Washington. All this was done, from which it appeared their property did not exceed in value eleven thousand dollars. "And upon the showing thus devised and accomplished by the plaintiff, he and Judge Cox were enabled to get the government to reduce the fine one-half." As to the other four items, his evidence tends to show an effort of himself and a co-counsel to get the district attorney to stay execution on the *in rem* judgment, and to prosecute the other suit against Wilkinson and others, but the evidence does not show that any improper influence was used in this behalf.

At the close of all the evidence, and on plaintiff's testimony alone, defendants asked the court to instruct that plaintiff could not recover for these five items. This the court declined to do, but did direct the jury that if any services sued for consisted in making a false statement of defendants' financial responsibility, for the purpose of deceiving the officers, and inducing them to remit the whole or a part of the fine, then for such services the plaintiff could not recover; and, further, that it was unlawful to solicit, or procure, an officer

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to do or not to do any act pertaining to the duties of his office, and contrary to his judgment, and if such was the purpose of any of the services rendered, then for all such the plaintiff could not recover.

1. It may be the jury excluded all of these items, for the plaintiff sued for \$6,640.85, and had a verdict and judgment for \$3,142.50, but this we cannot say, for the value of the other services was variously estimated.

Defendants cannot complain of the instructions given at their request. So far as the four items of fifty dollars each are concerned, it is very clear that the court did right in not excluding them as a matter of law. More doubt exists as to the other items, but as to this the law was fairly given by the court, leaving it to the jury to draw the inferences. In view of this, and the state of the pleadings, we think the cause should not be reversed. The character of the defence thus interposed at the close of the trial by prayers for instructions, was to admit that the services were rendered, but to avoid a recovery on the ground that they were illegal and contrary to public policy. Such a defence should be pleaded, and an intelligent issue made thereon.

(Here it is very clear that the question was raised incidentally, and that, too, at the close of the trial. It is not enough that evidence may appear tending to establish facts which, if pleaded, would defeat a recovery. The general denial puts in issue the facts pleaded in the petition, not the liability. The facts, from which the law draws the conclusion of non-liability, must be pleaded in the answer when they are not stated in the petition. *Bliss on Code Plead.*, sec. 352; *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 435; *Mason v. Pitt*, 21 Mo. 391; *Finley v. Quirk*, 9 Minn. 197. This defence, so far as pleading is concerned, is not unlike that of champerty, gaming, usury and the like. It is an affirmative defence, and should be clearly and distinctly

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stated. This was not done, not even attempted in this case.

2. The court may not comment on the evidence, nor should one or more facts be singled out and given an undue prominence in the instructions. The third instruction is not faulty for any of these reasons. It does say to the jury that in considering the value of the plaintiff's services they should take into consideration the magnitude of the cases, the skill required to perform the services, so far as possessed by plaintiff; the time required in the trial and preparation of the causes; and all the facts and circumstances touching the services so rendered. This was clearly the law.

Nor was there any error in the instruction which told the jury the nature of the offences with which defendants were charged in the indictment. These instructions, with those given at the request of the defendants, and which limited the recovery to the reasonable value of the services, presented the case fairly enough.

3. The verdict was: "We, the jury, find for the plaintiff, allowing him for his services three thousand dollars, as follows: Three thousand dollars, interest at six per cent. from December 16, 1880, \$142.50, making \$3,142.50." The objection made to it, that it is indefinite and uncertain, is without merit. That the aggregate finding was for \$3,142.50 is too clear to admit of a shadow of a doubt.

Upon the whole the judgment should be affirmed. It is so ordered. Sherwood, J., dissents. The other judges concur.